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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CHAUNCEY JACKSON,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for Writ of Certiorari to
the Supreme Court of Virginia

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

Section 17.110.1(C) of the Virginia Code mandates appellate review of each death sentence. The review requirements are written in two parts, (1) and (2). Part (1) addresses whether the sentence was imposed under the influence of passion, prejudice or an arbitrary factor. Part (2) addresses whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases. Those two parts of the statute are addressed respectively in questions I and II. The questions presented are:

I. Whether the Eighth Amendment and the due process and equal protection clauses of the Fourteenth Amendment forbid exposing a jury and a judge in a death penalty trial to opinions of a prosecution psychologist averring a risk of "future dangerousness" expressly predicated upon the defendant's race.

II. Whether the Virginia scheme of death penalty proportionality review meets the minimum requirements of due process under the Fourteenth Amendment.

III. Whether a capital defendant on trial in a state court has a Sixth and Fourteenth Amendment due process right to exclude persons from the jury who cannot read the English language.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	6
A. The Crime	7
B. Determining "Future Dangerousness" Based Upon Jackson's Race	7
C. Jackson's Objection to Seating an Illiterate Juror	8
D. The Appeal to the Virginia Supreme Court	10
REASONS FOR GRANTING THE WRIT	12
I. Because Petitioner's Race Played A Key Role in the Expert's Opinion of Future Dangerousness, The Case Warrants the Review of This Court	12

II. The Application of the Virginia Proportionality Statute Deprived Jackson of His Life and Liberty Interest Without Meaningful Notice Or Opportunity to be Heard..... 18

III. The Trial Court Denied Jackson's Right to Equal Protection and Due Process By Refusing to Exclude An Illiterate Juror..... 27

CONCLUSION..... 34

APPENDIX 1a

Opinion of the Supreme Court of Virginia 1a

Order Denying Petition for Rehearing..... 34a

TABLE OF AUTHORITIES

CASES

	Page
Armstrong v. Manzo, 380 U.S. 545 (1965)	26
Ballew v. Georgia, 435 U.S. 223 (1978)	28
Barefoot v. Estelle, 463 U.S. 880 (1983)	14, 15
Batson v. Kentucky, 476 U.S. 79 (1986)	16, 17
Beaver v. Commonwealth, 232 Va. 521, 352 S.E.2d 342 (1987).....	25
Brown v. Allen, 344 U.S. 443 (1953).....	29
Burch v. Louisiana, 441 U.S. 130 (1979).....	33
Campbell v. Blodgett, 997 F.2d 512 (9th Cir. 1992).....	19
Ceja v. Stewart, 97 F.3d 1246 (9th Cir. 1996) ...	19
Chabrol v. Commonwealth, 245 Va. 327, 427 S.E.2d 374, 378-79 (1993)	24
Chapman v. California, 386 U.S. 18 (1967).....	18
Chichester v. Commonwealth, 248 Va. 311, 448 S.E.2d 638 (1994)	22
Clemons v. Mississippi, 494 U.S. 738 (1990) ...	18
Commonwealth v. Brown, 231 Pa. Super. 431, 332 A.2d 828 (1974).....	30
Commonwealth v. Susi, 394 Mass. 784, 477 N.E.2d 995 (1985)	30, 31
Davidson v. Commonwealth, 244 Va. 129, 419 S.E.2d 656 (1992).....	24
Donnelly v. De Christoforo, 416 U.S. 637 (1974)	16
Dubois v. Commonwealth, 246 Va. 260, 435 S.E.2d 636 (1993).....	25
Evitts v. Lucey, 469 U.S. 387 (1985).....	18
Foster v. Delo, 39 F.3d 873 (8th Cir. 1994).....	19
Furman v. Georgia, 408 U.S. 238 (1972).....	13, 19
Glasser v. United States, 315 U.S. 60 (1942) ...	29

Goldberg v. Kelly, 397 U.S. 254 (1970) 19
Gray v. Commonwealth, 233 Va. 313, 356 S.E.2d 157 (1987)..... 24
Gregg v. Georgia, 428 U.S. 153 (1976) 13
Hewitt v. Helms, 459 U.S. 460 (1983) 19
Hicks v. Oklahoma, 447 U.S. 343 (1980)..... 19
Hoke v. Commonwealth, 237 Va. 303, 377 S.E.2d 595 (1989)..... 20, 24
Irvin v. Dowd, 366 U.S. 717 (1961) 16
Jackson v. Commonwealth, 255 Va. 625, 499 S.E.2d 538 (1998)..... 1
Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951)..... 26
Lankford v. Idaho, 500 U.S. 110 (1991) 21, 26, 27
Lockett v. Ohio, 438 U.S. 586 (1978) 14, 15, 18
Lowenfield v. Phelps, 484 U.S. 231 (1988) 16, 32
McCleskey v. Kemp, 481 U.S. 279 (1987) 13, 16, 17
Mason v. Virginia, No. 0499-96-4, 1997 Va. App. LEXIS 423 (1997) (unreported), *aff'd* 255 Va. 505, 498 S.E.2d 921 (1998) 31
Mason v. Virginia, 255 Va. 505, 498 S.E.2d 921 (1998) 32
Moran v. Godinez, 40 F.3d 1567 (9th Cir. 1995) 19, 21
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)..... 21
Mu'Min v. Commonwealth, 239 Va. 433, 389 S.E.2d 886 (1990)..... 24
Murphy v. Commonwealth, 246 Va. 136, 431 S.E.2d 48 (1993) 20, 25
O'Dell v. Commonwealth, 234 Va. 672, 364 S.E.2d 491 (1988)..... 24
Parratt v. Taylor, 451 U.S. 527 (1981)..... 21, 26
People v. Trevino, 826 P.2d 399 (Colo. Ct. App. 1991)..... 30
Poyner v. Commonwealth, 229 Va. 401, 329 S.E.2d 815 (1985)..... 23

Pulley v. Harris, 465 U.S. 37 (1984)..... 17, 19
Pruett v. Commonwealth, 232 Va. 266, 351 S.E.2d 1 (1986)..... 24
Reid v. Covert, 354 U.S. 1 (1957)..... 29
Roach v. Commonwealth, 251 Va. 324, 468 S.E.2d 98 (1996) 22
Robinson v. Louisiana, 428 U.S. 325 (1976)..... 15
Royal v. Commonwealth, 250 Va. 110, 458 S.E.2d 575 (1995)..... 25
Savino v. Commonwealth, 239 Va. 534, 391 S.E.2d 276 (1990)..... 22, 23, 25
Smith v. Phillips, 455 U.S. 209 (1982) 32
Spencer v. Commonwealth, 238 Va. 295, 384 S.E.2d 785 (1989)..... 23
Stamper v. Commonwealth, 220 Va. 260, 257 S.E.2d 808 (1979)..... 20
State v. Comeaux, 252 La. 481, 211 So.2d 620 (1968) 33
State v. Ji, 251 Kan. 3, 832 P.2d 1176 (1992) ... 33
Stout v. Commonwealth, 237 Va. 126, 376 S.E.2d 288 (1989)..... 20, 25
Taylor v. Louisiana, 419 U.S. 522 (1975)..... 29
Terrell v. State, 267 So.2d 179 (Miss. 1972)..... 33
Trop v. Dulles, 356 U.S. 86 (1958) 28
U.S. v. McDade, 929 F. Supp. 815 (E.D. Pa. 1996)..... 32
Vasquez v. Hillery, 474 U.S. 254 (1986) 16
Walker v. Deeds, 50 F.3d 670 (9th Cir. 1995) ... 19
Washington v. Davis, 426 U.S. 229 (1976) 13
Wayte v. United States, 470 U.S. 598 (1985) ... 16
Wilson v. Mississippi, 574 So.2d 1324 (Miss. 1990) 33
Woodson v. North Carolina, 428 U.S. 280 (1976) 16
Yeatts v. Commonwealth, 242 Va. 121, 410 S.E.2d 254 (1991)..... 20, 22, 23

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. amend. V ..... *passim*
U.S. Const. amend. VI ..... *passim*
U.S. Const. amend. VIII ..... *passim*
U.S. Const. amend. IV § 1 ..... *passim*
18 U.S.C. § 3595 (1994) 13
28 U.S.C. § 1257 (1993) 1
28 U.S.C. § 1865 (1994) 12, 32
Va. Const. Art 1, § 8 ..... 3, 28
Ala. Code § 12-16-59 (1997) 27
Alaska Stat. § 09.20.010 (Michie 1997) 27
Ariz. Rev. Stat. § 18.4 (1998) 27
Ark. Code Ann. § 16-31-102 (Michie 1997) 27
Colo. Rev. Stat. § 13-71-105 (1997) 27
Del. Code Ann. tit. 10, § 4509 (1997) 27
D.C. Code Ann. § 11-1906 (1998) 27
Fla. R. Civ. P. Form 1.983 (1998) 27
Ga. Code. Ann. § 17-10-35(c)(3) (1998) 13
Ga. Code. Ann. § 17-10-35(e) (1998) 13
Ga. Code. Ann. § 17-10-37(a) (1998) 13
Haw. Rev. Stat. § 612-4 (1997) 27
Idaho Code § 2-209 (1997) 27
Ind. Admin. Code tit. 33, r. § 33-4-5-7 (1998) ... 27
Kan. Stat. Ann. § 43-158 (1997) 27
La. Code Crim. Proc. Ann. art. 401 (West 1998) 27
Me. Rev. Stat. Ann. tit. 14, § 1211 (1997) 27
Md. Code Ann., Courts And Judicial Proceedings § 8-202 (1997) 27
Mass. Ann. Laws. ch. 234A, § 4 (Law. Co-op. 1998) 27
Miss. Code Ann. § 13-5-1 (1997) 27
Mo. Rev. Stat. § 494.425 (1997) 27
Neb. Rev. Stat. § 25-1601 (1998) 27
N.H. Rev. Stat. Ann. § 500-A:6 (1997) 27
N.J. Stat. § 2B:20-1 (1998) 27

N.M. Rules Ann. § 14-110 (1997), 42 Pa. Cons. Stat. § 4502 (1997) 27
S.C. Code Ann. § 14-7-810 (Law Co-op. 1997) 27
S.D. Codified Laws Ann. § 16-13-10 (1998)..... 27
Tex. Crim. Code Ann. art. 19.01 (1998) 27
Utah Code Ann. § 78-46-7 (1998) 27
Va. Code Ann. § 17-110.1 (Michie 1996)..... 4, 22
Va. Code Ann. § 17-110.1 (E) (Michie 1996)..... *passim*
Va. Code Ann. § 17-110.1 (F) (Michie 1996)..... 25
Va. Code Ann. § 17-110.1 (C) (2) (Michie 1996)..... 11
Va. Code Ann. § 19.2-264.2 (Michie 1995) 5, 6, 16
Vt. Stat. Ann. tit. 4, § 962 (1998) 27
V.I. Code Ann. tit. 4, § 471 (1998) 27
W. Va. Code § 52-1-5a (1998) 27

OTHER AUTHORITIES

H.R. Rep. No. 1076, 90th Cong. (1968), *reprinted in* 1968 U.S.C.C.A.N. §§ 1792, 1795 32
Randall Kennedy, *Race, Crime and the Law* (Pantheon Books 1997)..... 18
W. Ward Morrison, Jr., *Washington's Comparative Proportionality Review: Toward Effective Appellate Review of Death Penalty Cases Under the Washington State Constitution,* 64 Wash. L. Rev. 111, 111 (1989) 19
Daniel Schuman, *Psychiatric and Psychological Evidence* 7-13 (2d ed. 1995)..... 14

Steven M. Sprenger, Note, *A Critical Evaluation of State Supreme Court Proportionality Review in Death Sentence Cases*, 73 Iowa L. Rev. 719, 719 n.5 (1988)..... 20

Petitioner Chauncey Jackson, a Virginia inmate under sentence of death, respectfully prays that a writ of *certiorari* issue to review the judgment of the Supreme Court of Virginia affirming the sentence of death for capital murder in the course of a robbery attempt.

OPINIONS BELOW

The majority and dissenting opinions of the Supreme Court of Virginia are reported in *Jackson v. Commonwealth*, 255 Va. 625, 499 S.E.2d 538 (1998), and appear in the Appendix to this Petition at 1a. The denial of Jackson's petition for rehearing is unreported and appears in the Appendix to this Petition at 34a.

JURISDICTION

The opinion of Supreme Court of Virginia was filed on April 17, 1998. A timely petition for rehearing was filed on May 18, 1998. The Commonwealth Supreme Court's denial of the rehearing petition was issued on June 5, 1998. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257. This Court granted a Motion on July 17, 1998 extending the time for filing this Petition to October 5, 1998.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the United States Constitution, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor

> shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

This case also involves the Sixth Amendment to the United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

This case also involves the Eighth Amendment to the United States Constitution, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

This case also involves Section 1 of the Fourteenth Amendment to the United States Constitution, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves Article 1, § 8 of the Virginia Constitution, which provides:

> That in criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, and to call for evidence in his favor, and he shall enjoy the right to a speedy and public trial, by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty. He shall not be deprived of life or liberty, except by the law of the land or the judgment of his peers, nor be compelled in any criminal proceeding to give evidence against himself, nor be put twice in jeopardy for the same offense.
>
> Laws may be enacted providing for the trial of offenses not felonious by a court not of record without a jury, preserving the right of the accused to an appeal to and a trial by jury in some court of record having original criminal jurisdiction. Laws may also provide for juries consisting of less than twelve, by

not less than five, for the trial of offenses not felonious, and may classify such cases, and prescribe the number of jurors for each class.

In criminal cases, the accused may plead guilty. If the accused plead not guilty, he may, with his consent and the concurrence of the attorney for the Commonwealth and of the court entered of record, be tried by a smaller number of jurors, or waive a jury. In case of such waiver or plea of guilty, the court shall try the case.

The provisions of this section shall be self-executing.

This case also involves Va. Code Ann. § 17-110.1 (Michie 1996), which provides:

A. A sentence of death, upon the judgment thereon becoming final in the circuit court, shall be reviewed on the record by the Supreme Court.

B. The proceeding in the circuit court shall be transcribed a expeditiously as practicable, and the transcript filed forthwith upon transcription with the clerk of the circuit court, who shall, within ten days after receipt of the transcript, compile the record as provided in Rule 5:14 and transmit it to the Supreme Court.

C. In addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine:

1. Whether the sentence of death was imposed under the influence of passion,

prejudice or any other arbitrary factor; and

2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

D. In addition to the review and correction of errors in the trial of the case, with respect to review of the sentence of death, the court may:

1. Affirm the sentence of death;

2. Commute the sentence of death to imprisonment for life; or

3. Remand to the trial court for a new sentencing proceeding.

E. The Supreme Court may accumulate the records of all capital felony cases tried within such period of time as the court may determine. The court shall consider such records as are available as a guide in determining whether the sentence imposed in the case under review is excessive. Such records as are accumulated shall be made available to the circuit courts.

F. Sentence review shall be in addition to appeals, if taken, and review and appeal may be consolidated. The defendant and the Commonwealth shall have the right to submit briefs within time limits imposed by the court, either by rule or order, and to present oral argument.

This case also involves Va. Code Ann. § 19.2-264.2 (Michie 1995), which provides:

> In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

STATEMENT OF THE CASE

Chauncey Jackson was convicted by a jury of the capital offense of murder during a robbery attempt. He was sentenced to die by the Circuit Court of the City of Norfolk, Virginia, on May 20, 1997. At the time of the murder, Jackson was sixteen years and six weeks old. As required by state statute, the Virginia Supreme Court reviewed the sentence of death. It determined that (1) it was not imposed out of passion or prejudice and (2) it was proportional and not excessive. The court held that there was sufficient evidence to support the finding of Jackson's "future dangerousness," one of two statutory aggravating factors that must be present to impose a Virginia death penalty.[1]

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[1] The other aggravating factor is the "vileness" of the crime. Va. Code Ann. § 19.2-264.2.

A. The Crime

The crime for which Jackson has been sentenced to die occurred on the evening of August 31, 1994. Jackson, who was in a car with a companion, rode past a "dope house". Three acquaintances of Jackson hailed him as he rode by. One suggested robbing a man, Ronald Bonney, who was sitting in the driver's seat of a car parked outside the "dope house". Bonney's friend was transacting a purchase inside the house.

Together, they proceeded with the attempted robbery. Two acted as lookouts. Jackson took a .25 caliber Beretta handgun from the car in which he had been riding and, accompanied by two other members of the group, approached Bonney's car. One of them blocked the driver's side door and took the keys from the ignition when Bonney attempted to drive away. Meanwhile, Jackson entered Bonney's car from the passenger's side and told Bonney to "give it up." Bonney patted his pockets and replied, "Give what up?" Bonney then said "Shoot me, you little f—ker." Jackson subsequently told the police that at that point he cocked the gun and it jammed. He recounted that he tried to unjam it, but it fired three times mortally wounding Bonney. Jackson fled the scene but was arrested later that night.

B. Determining "Future Dangerousness" Based Upon Jackson's Race

Evan Nelson, Ph.D., was appointed by the trial court as a prosecution expert to opine on Jackson's competence and on his "future dangerousness". In both his voir dire testimony, out of the jury's presence, and in his testimony to the jury, Dr. Nelson relied upon "risk factors" to render his opinion regarding Jackson's likelihood of future dangerousness. During the voir dire testimony, Nelson cited

Jackson's race as one of the primary risk factors upon which he relied in reaching his opinion:

> They [risk factors] include factors such as the nature of prior violent offenses, a defendant's age, a *defendant's race*, a defendant's marital status, the nature of the offenses themselves in the past . . . a history of substance dependence or alcohol dependence, *and a variety of other smaller issues* that may be relevant to the content of setting where that person will be residing in the future.

(emphasis supplied). Based upon the foregoing assessment of Jackson, Dr. Nelson testified that there was a high probability that Chauncey Jackson would be a danger in the future. Among the risk factors that contributed positively to that high probability was Jackson's race: Jackson is an African-American.

C. Jackson's Objection to Seating an Illiterate Juror

The defendant and Commonwealth jointly moved the trial judge to try the case without a jury. The trial court denied the parties' motion. During jury selection, at Jackson's suggestion, the trial judge concluded that one of the prospective jurors was illiterate. The prospective juror was unable to sign her name on the jury questionnaire form and orally misspelled her name three times. The defense moved that the illiterate prospective juror be stricken for cause. The documents to be offered in evidence included three written conflicting confessions by Jackson and the autopsy report, as well as complicated written jury instructions and a written verdict form.

In order to evaluate the merit of the motion to strike, the court conducted the following voir dire:

> Q. Mrs. Highter, I reviewed your questionnaire, and you stated you

completed the sixth grade. And its clear you have a little trouble spelling and reading and writing.

A. Uh-huh.

Q. Did you understand all the questions that were asked on the questionnaire?

A. Yes, ma'am.

Q. All right, assuming that you have trouble reading, because I think you may have misspelled your name, which had an H in it and you didn't put an H down -- how do you spell your last name?

A. H-a -- H-h -- H-a-i-g-h-t.

Q. H-i-g-h-t-e-r? You spelled it - may I see it?

What she did was put an E down for an H. Is your middle initial E?

A. Uh-huh. Mary Elizabeth.

Q. She left out the H is what she did. [Mrs. Highter's questionnaire was not included in the trial record. Her juror affidavit is included, however, and on that form Mrs. Highter appears to have spelled her last name as "ihtetr".]

If there are exhibits in this case you might have difficulty reading them?

A. Uh-huh.

Q. Would you be able to have someone in the jury room read all the exhibits to you or we can read them during the trial if you were chosen?

A. Uh-huh.

Q. Were there exhibits in the other case you served on?

A. Yes.

Q. Did you read them yourself or did someone read them to you?
A. They read them to us -- to me.
Q. So you read over each exhibit and they read them to you?
A. Yes.

On the basis of that colloquy, the court ruled that the illiterate juror was qualified to serve on the jury.

Because of the presence of an illiterate juror, the witnesses read aloud most, but not all, of the written exhibits. No one read the autopsy report. The trial judge read the instructions and the verdict sheet to the jury. Literate jurors were furnished with, and were able to review, copies of the written exhibits, instructions and verdict sheet during deliberations. The trial judge instructed the other jurors to read the documents to the illiterate member if she requested their assistance during deliberations.

D. The Appeal to the Virginia Supreme Court

On direct appeal to the Virginia Supreme Court, the review of the death sentence was consolidated with the capital murder appeal. The court opined that its mandatory "independent review of the entire record fails to reveal that the jury's death sentence was imposed under the influence of passion, prejudice or any other arbitrary factor." (App. at 27a.) The court made no finding whether imposition of the sentence by the trial judge was "under the influence of passion, prejudice or any other arbitrary factor."

In affirming the death sentence as neither excessive nor out of proportion, the Virginia Supreme Court specifically relied upon the testimony of the expert psychologist for the Commonwealth. When called by the

Petitioner,[2] the psychologist opined "Jackson exhibited more of the risk factors for future violent acts `than many of the other [criminal] defendants I have evaluated.'" (App. at 25a.) Prominent among the risk factors that the Commonwealth's psychologist identified in his voir dire testimony, as supporting his opinion of a likely risk of future violent acts, was the Petitioner's race, which is African-American.

By statute, the Virginia Supreme Court must examine similar cases to determine whether the imposition of the death penalty was excessive or disproportionate "considering both the crime and the defendant." Va. Code Ann. § 17-110.1(C)(2). The statute neglects to define "similar case." In Jackson's appeal, the court majority cited sixteen "similar" cases; the dissent cited seven cases. The pools of "similar cases" cited by the majority and the dissent have no case in common. The majority opinion compared Petitioner's case to those in which "robbery or attempted robbery was the underlying felony and the death penalty was based on the 'future dangerousness' predicate." (App. at 28a.) The dissent, on the other hand, compared Petitioner's case to those in which the defendant was, like Jackson, sixteen years old at the time of the crime. (App. at 30a-33a.) The Supreme Court of Virginia found that the "comparison of the record in this case with the records in other capital murder cases, including those in which life sentences were imposed, fails to indicate that the death penalty imposed in this case is 'excessive or disproportionate to the penalty imposed in similar cases....'" (App. at 28a.) The dissent observed that "[s]ince 1987, ten 16-year-old offenders have been convicted

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[2] The trial judge in her discretion as to the order of proof suggested that if the defense called Nelson he would have to testify only once. If the defense did not call him, he would testify twice—in the Commonwealth's case in chief and again in its rebuttal case.

of capital murder, and only one defendant, Chauncey J. Jackson, has been sentenced to death." (App. at 30a.)

The court also rejected Jackson's claim that his Fifth, Sixth and Fourteenth Amendment rights were violated by seating an illiterate juror in a capital case involving documentary evidence. (App. at 15a.) Jackson had asserted that 28 U.S.C. § 1865, which requires a juror in the federal courts to be able to read, write, and understand the English language, is illustrative of the strong public policy against seating illiterate jurors. *Id.* To the contrary, the court opined, "In Virginia, illiteracy does not disqualify a person from serving as a juror if the trial court takes steps so that the illiterate juror has essentially the same opportunity to review the written material in the case as the other jurors." *Id.* The court then found

> that virtually all the documentary evidence, the court's instructions to the jury and the verdict forms were read to the jury, and that the illiterate juror was able to have any documents read to her by the other jurors. And we assume that the other jurors accurately read the documents to the illiterate juror.

Id. The court, on that basis, concluded that Jackson's right to a fair jury trial was not violated by the seating of the illiterate juror.

REASONS FOR GRANTING THE WRIT

I. Because Petitioner's Race Played A Key Role in the Expert's Opinion of Future Dangerousness, The Case Warrants the Review of This Court.

This Petition asks the Court in Question I to declare that a sentence of death based, at least in part, on Petitioner's race, African-American, is a fundamental abridgement of equal justice under law, violates the Eighth Amendment as

applied to the states and is a repugnant denial of equal protection, *see Washington v. Davis*, 426 U.S. 229 (1976) (requiring proof of intentional discrimination), *cf. McCleskey v. Kemp*, 481 U.S. 279 (1987) (rejecting statistical analysis as showing significant risk of racial bias).

This Court has recognized the importance of proportionality review as a check against random and arbitrary imposition of the death penalty. *Gregg v. Georgia*, 428 U.S. 153 (1976). Appellate proportionality review procedures "assure that no defendant convicted under [random and arbitrary] circumstances will suffer a sentence of death." *Id.* In *Gregg*, Justice White opined that "if the Georgia Supreme Court properly performs the task assigned to it under the Georgia statutes, death sentences imposed for discriminatory reasons or wantonly or freakishly for any given category of crime will be set aside."[3] *Id.* at 224 (White, J., concurring). Since then, the federal government has adopted proportionality review in death cases. 18 U.S.C. § 3595 (1994).

Virginia's proportionality statute was enacted to meet constitutionally minimum death sentence review procedures. *See generally Furman v. Georgia*, 408 U.S. 238 (1972) (plurality opinion). It is in two parts. The first part relates to the manner in which the jury and judge arrive at the death sentence. The second part addresses its relative fairness. As an independent review, the proportionality study is not

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[3] The Georgia statute at issue in *Gregg* stated that in every case the Supreme Court of Georgia is required to determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Ga. Code. Ann. § 17-10-35(c)(3)(1998). When the court affirms a death sentence, it must include in its decision references to similar cases it has considered. § 17-10-35(e). Additionally, the statute requires the court to maintain records of all capital cases since 1970 in which the death penalty was imposed. § 17-10-37(a).

limited to errors raised by a defendant. Moreover, the statute does not limit appellate review solely to the improper influences upon and decisions by a jury. Nothing in the statute's broad language excludes review of similar influences upon and determinations of the trial judge. Nevertheless, the Virginia Supreme Court gave no indication that it had considered prejudices influencing the trial judge in imposing the maximum penalty in this case.

In *Lockett v. Ohio*, 438 U.S. 586 (1978), the Court opened the door for capital defendants to offer mitigating evidence in the trial's sentencing phase. In 1983, the Court held that psychiatric testimony was admissible to establish the "future dangerousness" of a capital defendant. *Barefoot v. Estelle*, 463 U.S. 880, 896-98 (1983).

In *Barefoot*, the opinion of Justice White observed that to bar psychiatric testimony was as if the court were asked to disinvent the wheel. *Id.* at 896. Petitioner's case asks, though, that certain types of psychiatric testimony be ruled inadmissible by this Court for the very reason that they, too, disinvent the wheel by undermining the progress toward a racially neutral society.

Generally speaking, the search for future dangerousness depends on one of two types of psychiatric opinion testimony: clinical or actuarial. Daniel Schuman, *Psychiatric and Psychological Evidence* 7-13 (2d ed. 1995). In the former, the clinician evaluates the subject based on his or her individual characteristics. *See, e.g., Lockett*, 438 U.S. at 605. That type of evaluation may involve psychological testing and clinical examination. The actuarial method involves the application of statistical probabilities based on, *inter alia*, race, age, sex and marital status. Schuman at 7-13. Using the actuarial method, the Commonwealth's psychologist opined that Petitioner's race was a causal factor in his future dangerousness.

Regardless of whether the mental health community is able to predict future dangerousness with any reliability, application of the actuarial method violates bedrock

principles iterated in *Lockett* and *Robinson v. Louisiana*, 428 U.S. 325, 331-334 (1976) (plurality opinion). Assessment of each individual by his characteristics and conduct is a fundamental right of even the convicted criminal defendant. Accepting race as an actuarial method predictor of future risk must be adjudged as outside the grant of *Barefoot v. Estelle* and be exiled from every state's justice system as alien to every person's claim to equality under the Fourteenth Amendment.

Immediately subsequent to Dr. Nelson's declaration that the Petitioner's race was a risk factor for his future dangerousness, the trial judge observed, "I really would like to tell you that I have seldom, if ever, heard a clearer, more precise, professional....I really was enormously impressed." Then, in finding no good cause to reject the jury's recommendation of death, the trial judge embraced that same expert's opinion as her own, saying:

> Given Dr. Nelson's elucidation of the influence of those factors of his personality that are lifelong and permanent and show his inability to conform even with the toughest structure, the most intense structure, the constraints of society, and given the facts of this case and of this defendant's background, I find the jury's recommendation to be appropriate, and that Chauncey Jackson will be sentenced to death.

Thus, a jury deliberated the life or death of Chauncey Jackson based upon the expert testimony of his future dangerousness because of the color of his skin. No juror heard the racial basis of the expert's opinion or had the opportunity to explore the foundation of the testimony that Petitioner exhibited more of the risk factors for future violent acts "than many of the other defendants I have evaluated." However, the trial court was fully aware of the expert opinion's basis and permitted it to go to the jury knowing it

was founded upon the antithetical notion that blacks are more dangerous than whites.

Though the Virginia Supreme Court was bound to review the entire record carefully for prejudice, it found none. *See Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion). Petitioner respectfully suggests that either there was no meticulous review of the record by that court or the extensive and unanimous efforts of this Court to wipe out racism in our justice system require a reiteration in this case.

While this Court has declined "to assume that what is unexplained is invidious", *McCleskey*, 481 U.S. at 313, that has not stopped the Court from attacking racism when it is actual and demonstrable, rather than merely inferred. *See, e.g., Batson v. Kentucky*, 476 U.S. 79 (1986) (preemptory challenges based on race); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (exclusion of African Americans from juries); *Wayte v. United States*, 470 U.S. 598 (1985) (prosecutorial discretion based on race); *Donnelly v. De Christoforo*, 416 U.S. 637 (1974) (racially based prosecution arguments); *Irvin v. Dowd*, 366 U.S. 717 (1961) (community prejudice requires venue change).

It is impossible to know the degree to which race accounted for the death sentence in this case. It is indisputable, however, that Dr. Nelson opined that Chauncey Jackson was a future risk to the community because he was black, young, and male. In addition to whatever weight the jury gave to Dr. Nelson's race-based opinion, both the trial judge and the Virginia Supreme Court accepted it without even questioning the notion that African-Americans, because of their race, are more apt to be dangerous than are other Americans. *But see* Va. Code Ann. § 19.2-264.2 (Michie 1995).

It cannot be gainsaid that the Eighth Amendment requires a heightened reliability standard in capital sentencing proceedings. *See Lowenfield v. Phelps*, 484 U.S. 231 (1988) (addressing the qualitative difference between death and other penalties). Seemingly, this Court has already made clear that,

"because of the risk that the factor of race may enter the criminal process, [the Court engages] in unceasing efforts to eradicate racial prejudice from our criminal justice system." *McCleskey*, 481 U.S. at 309 (citing *Batson*, 476 U.S. at 85). This case begs for another such effort.

While comparative review of death sentences is not constitutionally mandated, *Pulley v. Harris*, 465 U.S. 37, 50-51 (1984), if a state does have a proportionality review statute, the defendant is entitled to its benefit. The Petitioner did not receive that benefit. The Virginia Supreme Court evidently overlooked the role of race and prejudice in Petitioner's sentencing: "[O]ur independent review of the entire record fails to reveal that the jury's death sentence was imposed under the influence of passion, prejudice or any other arbitrary factor." (App. at 27a.) Despite its "independent review of the entire record", the opinion never mentions the psychologist's reliance upon race in forming his opinions and, while it refers to the jury's death sentence, it utterly fails to review the impact on the trial judge of the racial basis of Nelson's opinion. Just as important, the court's opinion fails to recognize that the jury unwittingly relied upon an expert opinion predicated upon Petitioner's race. Even as the trial judge imposed the death sentence, she commented, "He [the psychologist] stated—and this is a man who 50 percent of his clients are capital murder defendants, that the defendant has, quote, many more risk factors, end quote, than many others that he's (sic) evaluated."

Although it is unknown how many of Dr. Nelson's previous "clients" were Caucasians or African-Americans, the judge's reference to Dr. Nelson's clients points to the inferential problem of predicting normative behavior of an individual defendant from a group over-represented—and biased—by "capital murder defendants." Race may be a descriptive sociological and demographic characteristic, but it is not a personality or behavioral trait that can diagnose or predict future dangerousness, or even normative behavior, of a given individual. Race is not a proxy for criminality or for

dangerousness. *See generally* Randall Kennedy, *Race, Crime and the Law* (Pantheon Books 1997). This court has stated as much with respect to other generalized group characteristics. *See, e.g., Lockett*, 438 U.S. at 604-05. Race is no more conclusive a predictor for dangerousness than Irish or Scandinavian ancestry is for alcoholism, German ancestry is for being warlike, or Swiss origin is for being a banker.

Petitioner does not suggest that Dr. Nelson's opinions were chiefly informed by racist conclusions, or that he failed to consider more "appropriate" indicators of risk. But, it is inescapable that Dr. Nelson's conclusions about Jackson were accounted for and derived, at least in part, by Jackson's race. Whether the race of the Petitioner accounted for 90 percent or 5 percent of Nelson's opinion is unknown. No matter the weight, its admissibility is repugnant to our Constitution. Measured by rules governing "harmless error", no conscientious observer could conclude that Dr. Nelson's reliance on race as a predictor was harmless beyond a reasonable doubt. *See, e.g., Clemons v. Mississippi*, 494 U.S. 738, 752-754 (1990); *Chapman v. California*, 386 U.S. 18, 24 (1967).

II. The Application of the Virginia Proportionality Statute Deprived Jackson of His Life and Liberty Interest Without Meaningful Notice Or Opportunity to be Heard.

Virginia violated Jackson's due process right when it deprived him of his Constitutionally protected life and liberty interest by conducting its appellate proportionality review without adequate procedural protections. *See Evitts v.*

Lucey, 469 U.S. 387, 401 (1985); *Goldberg v. Kelly*, 397 U.S. 254, 262-65 (1970).[4]

Proportionality review is a system by which appellate courts attempt to achieve relative uniformity among capital sentences. *See generally* W. Ward Morrison, Jr., *Washington's Comparative Proportionality Review: Toward Effective Appellate Review of Death Penalty Cases Under the Washington State Constitution*, 64 Wash. L. Rev. 111 (1989). Generally, the inquiry under proportionality statutes is whether the death penalty is unacceptable in a case because it is disproportionate to the punishment imposed on others convicted of a similar crime. *See, e.g., Pulley*, 465 U.S. at 43. Proportionality review in death cases developed as a result of the Court's decision in *Furman*, 408 U.S. at 238. Prior to *Furman*, the sentencer in capital cases had virtually unbridled discretion. *See id.* at 248 (Douglas, J., concurring)

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[4] Constitutionally protected liberty interests arise from either the Due Process Clause or from the laws of the States. *See Hewitt v. Helms*, 459 U.S. 460, 466 (1983) ("Liberty interests protected by the Fourteenth Amendment may arise from two sources—the Due Process Clause itself and the laws of the States"). When a state guarantees a defendant certain procedural rights, the state creates a liberty interest which the Due Process Clause shelters from arbitrary deprivation. *See Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980); *Walker v. Deeds*, 50 F.3d 670, 673 (9th Cir. 1995) (holding that Nevada's law requiring a court to review and make certain findings before a defendant can be adjudged a habitual offender creates a Constitutionally protected liberty interest); *Foster v. Delo*, 39 F.3d 873, 878 (8th Cir. 1994) (en banc) (noting that where state law provides for proportionality review, due process standards apply); *Campbell v. Blodgett*, 997 F.2d 512, 522 (9th Cir. 1992) (finding a Constitutionally protected liberty interest in a Washington State law requiring review and particularized findings before affirming a death sentence). When a state misapplies or denies the application of state procedures and the result is a deprivation of a substantive right, a federally recognized liberty interest is implicated. *See Ceja v. Stewart*, 97 F.3d 1246, 1252 (9th Cir. 1996) (quoting *Moran v. Godinez*, 40 F.3d 1567, 1574 (9th Cir. 1995)).

(noting that a sentencer was given "practically untrammeled discretion to let an accused live or insist that he die").

Following *Furman*, several states, including Virginia, enacted legislation establishing death sentence review procedures to meet the constitutional minimums. *See* Steven M. Sprenger, Note, *A Critical Evaluation of State Supreme Court Proportionality Review in Death Sentence Cases*, 73 Iowa L. Rev. 719, 719 n.5 (1988). In conducting a proportionality review under its statute, "[t]he Virginia Supreme Court may accumulate the records of all capital felony cases tried within such period of time as the court may determine." Va. Code Ann. § 17-110.1(E). In addition, "[t]he court shall consider such records as are available as a guide in determining whether the sentence imposed in the case under review is excessive." *Id.* The statute provides no other procedural or substantive guidance. The Supreme Court of Virginia, however, has set forth a test for comparison under the statute:

> The test is not whether a jury may have declined to recommend the death penalty in a particular case but whether generally juries in this jurisdiction impose the death sentence for conduct similar to that of the defendant.

Stamper v. Commonwealth, 220 Va. 260, 283-84, 257 S.E.2d 808, 824 (1979); *see also Murphy v. Commonwealth*, 246 Va. 136, 145, 431 S.E.2d 48, 54 (1993); *Yeatts v. Commonwealth*, 242 Va. 121, 142, 410 S.E.2d 254, 267 (1991); *Stout v. Commonwealth*, 237 Va. 126, 137, 376 S.E.2d 288, 294 (1989); *Hoke v. Commonwealth*, 237 Va. 303, 318, 377 S.E.2d 595, 604 (1989).

Because the Virginia proportionality statute fails to articulate the procedural standards for implementing the proportionality review, it fails to ensure that the review is conducted in accordance with due process. Moreover, in its application of the review, the Supreme Court of Virginia has further eroded the statutory right by providing less review than the statute requires. Jackson was entitled to have his

sentence compared to other "similar cases" for proportionality. Until one with authority is willing to say what "similar cases" means, and apply the same procedural standard in all cases, Virginia's *ad hoc* application of the statute will continue to violate due process standards. *See Moran v. Godinez*, 40 F.3d 1567, 1574 (9th Cir. 1995).

Under the proportionality statute and the Supreme Court of Virginia's application of it, Jackson did not have meaningful notice or a meaningful opportunity to be heard. Fundamental to due process is that the defendant have an opportunity to be heard at a meaningful time and in a meaningful manner. *See Parratt v. Taylor*, 451 U.S. 527, 540 (1981). The "importance of giving the parties sufficient notice to enable them to identify the issues on which a decision may turn" is well established. *Lankford v. Idaho*, 500 U.S. 110, 126 n.22 (1991). In all circumstances, the notice must both apprise the parties of a pending action and afford them a meaningful opportunity to present their case. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). "In the capital context, in which the threatened loss is so severe, the need for notice is even more pronounced." *Lankford*, 500 U.S. at 126 n.22.

The Virginia statute provides for review using a compilation of cases:

> E. The Supreme Court may accumulate the records of all capital felony cases tried within such period of time as the court may determine. The court shall consider such records as are available as a guide in determining whether the sentence imposed in the case under review is excessive. Such records as are accumulated shall be made available to the circuit courts.

Va. Code Ann. § 17-110.1(E). While the statute requires the Supreme Court of Virginia to examine whether a particular case's sentence is excessive or disproportionate to the penalty imposed in "similar cases", it does not define "similar

case". *Id.* at § 17-110.1. Instead, the statute vaguely defines a universe from which the court can draw "similar cases". *Id.* at § 17-110.1(E). The statute provides no directive regarding which cases the court should include in the review of a defendant's sentence. Accordingly, the result may be skewed, depending on the cases used.

The statute's failure to inform Petitioner of what constituted a "similar case" led to a denial of due process in the instant case. As noted, the majority cited as comparison cases a total of sixteen "similar cases." (App. at 28a.) Justice Hassell, in dissent, cited seven cases which he utilized as comparison cases. (App. at 30a-33.) The pools of "similar cases" cited by the majority and the dissenting judge had not a single a case in common. *Compare* App. at 28a. *with* App. at 30a-33a. The majority compared Jackson's case to those involving robbery and "future dangerousness." (App. at 28a.) On the other hand, the dissent compared Jackson's case to those in which defendants were also sixteen years old. (App. at 30a-33a.)

The *Jackson* majority cited three cases compiling other cases "in which robbery or attempted robbery was the underlying felony and the death penalty was based only on the 'future dangerousness' predicate." (App. at 28a.) *Yeatts*, 242 Va. at 143, 410 S.E.2d at 267-68 (compiling eight cases); *Chichester v. Commonwealth*, 248 Va. 311, 332-33, 448 S.E.2d 638, 652 (1994) (compiling three cases); *Roach v. Commonwealth*, 251 Va. 324, 351, 468 S.E.2d 98, 113 (1996) (compiling two cases). *Yeatts*, in its compilation of cases, for example, cited to *Savino v. Commonwealth*, 239 Va. 534, 391 S.E.2d 276 (1990). Yet, *Jackson* is wholly distinct from the facts of *Savino*. In *Savino*, the defendant, after using cocaine, went to the bedroom of the victim, striking him with a hammer with "such force that brain tissue exuded from [his] skull." *Savino*, 239 Va. at 538, 391 S.E.2d at 278. While the victim was still alive, the defendant stabbed the victim numerous times with two different knives, leaving both knives in the victim's back. The defendant took $100

from the victim's wallet and then returned later in the night to steal the victim's personal possessions. *Id.* *Yeatts* also cites *Poyner v. Commonwealth*, 229 Va. 401, 329 S.E.2d 815 (1985) as a "similar case". That defendant was convicted of murdering five women in four separate instances within eleven days.

Moreover, in an Orwellian twist, the *Savino* court, in its proportionality review, cited to *Spencer v. Commonwealth*, 238 Va. 295, 384 S.E.2d 785 (1989). However, *Spencer* involved rape and forcible sodomy in addition to murder and robbery. *Spencer*, 238 Va. at 299, 384 S.E.2d at 788. Nonetheless, *Spencer*, through *Savino*, was compared as a "similar case" to *Jackson*.

Without minimizing murder, the facts of *Jackson* are a far cry from a case with rape, sodomy and murder. Neither the statute nor the court gave Jackson adequate notice of what a "similar case" is. With no guidance in the statute or from the Supreme Court of Virginia as to what cases will be considered in comparison, a defendant has no meaningful opportunity to argue a distinction between his case and other cases, his conduct and other conduct, or his characteristics and the characteristics of other defendants. Accordingly, Jackson had no opportunity, for example, to argue to the court the distinctions between his case and cases like *Spencer* and *Savino*. This lack of opportunity and absence of notice violated the due process clause.

The Petitioner's case is but one more in the number of death penalty cases in which the Virginia Supreme Court has failed to provide notice of the type of similar cases it will consider or the procedure for determining which cases are similar. Increasing the harm of not being informed by the statute or by court rule of what is a "similar case," one cannot even extrapolate an educated guess from studying the court's opinions. *See, e.g., Spencer*, 238 Va. at 577, 385 S.E.2d at 858 ("We have accumulated the records of all capital murder cases reviewed by this Court ... and after considering those records, we conclude that Spencer's sentence of death was

not excessive or disproportionate to sentences generally imposed by other sentencing bodies in Virginia for comparable or similar crimes"); *Gray v. Commonwealth*, 233 Va. 313, 354, 356 S.E.2d 157, 180 (1987) ("[W]e have accumulated and considered the records of all capital murder cases reviewed by this Court to determine whether `juries in this jurisdiction generally approve the supreme penalty for comparable or similar crimes'") (citation omitted); *Pruett v. Commonwealth*, 232 Va. 266, 287-88, 351 S.E.2d 1, 14 (1986) ("Considering both the crime and the defendant involved in this case, we can say without qualification that Pruett's offense is the sort for which juries in Virginia generally have approved the death penalty"). Until defendants are on notice of the cases upon which the court will rely for its comparison, they will be deprived, as was the Petitioner, of their due process rights to a meaningful opportunity to address their fates.[5]

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[5] In some cases, for example, the court considers the absence or presence of statutory precepts to the death penalty. *See, e.g., Chabrol v. Commonwealth*, 245 Va. 327, 335, 427 S.E.2d 374, 378-79 (1993) (noting that the court was "giving particular attention to those cases where the death penalty was based solely on the 'vileness' predicate"); *Mu'Min v. Commonwealth*, 239 Va. 433, 451, 389 S.E.2d 886, 897 (1990) (comparing the case under review to cases where the death penalty was based on the predicates of "vileness" and "future dangerousness"); *Hoke v. Commonwealth*, 237 Va. 303, 318, 377 S.E.2d 595, 604 (1989) (comparing the case under review to cases where the death penalty was based on the predicates of "vileness" and "future dangerousness" as well as underlying felonies); *O'Dell v. Commonwealth*, 234 Va. 672, 706, 364 S.E.2d 491, 510 (1988) (basing review on "future dangerousness"). In some cases, the court only considers cases in which the death penalty is imposed while in others it includes capital cases in which the result is life imprisonment. *Compare, e.g., Chabrol*, 245 Va. at 335-36, 427 S.E.2d at 378-379 (noting that the court reviewed the records of capital murder cases where the penalty imposed was either the death penalty or life imprisonment), *and Davidson v. Commonwealth*, 244 Va. 129, 136, 419

(footnote continued to next page)

In an attempt to ensure the meaningful opportunity for a defendant to address proportionality, the statute provides that the parties involved in death penalty proportionality review have the right to submit briefs and to present oral arguments. *See* Va. Code Ann. § 17-110.1(F). Thus, the relationship and role of "similar cases" to the death sentence is parallel to the trial record and as critical to the sentence as the content of the trial transcripts. Nonetheless, a defendant learns of the identity of the cases considered, if at

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S.E.2d 656, 660 (1992) ("We have examined the records of all capital murder cases reviewed by this Court since the adoption of Code § 17-110.1"), *and Murphy v. Commonwealth*, 246 Va. 136, 145-46, 431 S.E.2d 48, 54 (1993) (noting that the court reviewed all capital murder cases where the result was either the death penalty or life imprisonment), *with Savino v. Commonwealth*, 239 Va. 534, 391 S.E.2d 276 (1990) (noting that the court considered "the records of all capital murder cases that have been appealed to [the] court," which presumably excluded life sentences that are not entitled to automatic review) *and Stout v. Commonwealth*, 237 Va. 126, 137, 376 S.E.2d 288, 294 (1989) ("[W]e have compiled and considered the records of all capital murder cases appealed to this court"). In some cases the court has indicated that it will consider some underlying felony, *see, e.g., Dubois v. Commonwealth*, 246 Va. 260, 267, 435 S.E.2d 636, 640 (1993) ("We have reviewed capital murder cases with robbery as the underlying felony..."). In other cases, the court considers cases that are factually similar to the case before the court on review. *See, e.g., Royal v. Commonwealth*, 250 Va. 110, 120, 458 S.E.2d 575, 580 (1995) ("We have reviewed cases involving capital murder of a police officer"); *Murphy*, 246 Va. at 145, 431 S.E.2d at 54 ("[W]e have examined the records of all capital murder cases previously reviewed by this Court where, as here, the death penalty was based upon murder for hire"); *Beaver v. Commonwealth*, 232 Va. 521, 536, 352 S.E.2d 342, 351 (1987) ("From our review of all capital murder cases appealed to this Court involving murders of law enforcement officers, including two cases in which life sentences were imposed, we conclude that Beaver's death sentence is not excessive or disproportionate").

all, only by reading the court's final opinion. Even at that point, parties learn only of those cases the court chooses to cite in its opinion. Notification in the opinion is useless to a defendant like the Petitioner who, at that point, already has been deprived of his only meaningful opportunity to be heard. *See Parratt*, 451 U.S. at 540 (finding the opportunity to be heard at a meaningful time and in a meaningful manner to be fundamental to due process); *see also Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

At issue in Petitioner's case is whether it can be said that he "had adequate notice of the critical issue[s] that the judge[s were] actually debating." *Lankford*, 500 U.S. at 120. Although Petitioner wrote the brief and made his argument, only the Supreme Court of Virginia knew the "similar cases" that should have been addressed in the exercise of the statutory right to argue and brief proportionality. *See id.* (rejecting the death sentence because the "silent judge" was the only person who knew the issue that should have been debated).

The decision on which cases were "similar" to Petitioner's was made behind closed doors and announced only after Jackson's one opportunity to be heard on the issue.

> No better instrument has been devised for arriving at the truth than to give a person in jeopardy of serious loss notice of the case against him and the opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171-2 (1951) (Frankfurter, J., concurring). Jackson had no notice of what the Supreme Court of Virginia was going to consider in its proportionality review of his case. "Notice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure." *Lankford*, 500 U.S. at 126. Accordingly, because of the lack of fair

procedure, Petitioner has suffered the loss of a right unequalled in value—the right to be heard and respond to the conduct against which he was to be measured for either loss of liberty or loss of life.[6]

III. The Trial Court Denied Jackson's Right to Equal Protection and Due Process By Refusing to Exclude An Illiterate Juror.

The legislatures of at least thirty states and territories of the United States bar illiterate persons from jury service.[7] Even when no statute exists, however, the constitutional right

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[6] The *Lankford* Court focused on the apparent contradiction of the notice requirement due process dictated in different contexts and the possibility that no such requirement would be made during the process implementing a capital punishment: "In the capital context, in which the threatened loss is so severe, the need for notice is even more pronounced." *Lankford*, 500 U.S. at 188 n.22.

[7] The statutes and rules that require that jurors be able to read are: Ala. Code § 12-16-59 (1997), Alaska Stat. § 09.20.010 (Michie 1997), Ariz. Rev. Stat. § 18.4 (1998), Ark. Code Ann. § 16-31-102 (Michie 1997), Colo. Rev. Stat. § 13-71-105 (1997), Del. Code Ann. tit. 10, § 4509 (1997), D.C. Code Ann. § 11-1906 (1998), Fla. R. Civ. P. Form 1.983 (1998), Haw. Rev. Stat. § 612-4 (1997), Idaho Code § 2-209 (1997), Ind. Admin. Code tit. 33, r. § 33-4-5-7 (1998), Kan. Stat. Ann. § 43-158 (1997), La. Code Crim. Proc. Ann. art. 401 (West 1998), Me. Rev. Stat. Ann. tit. 14, § 1211 (1997), Md. Code Ann., Courts And Judicial Proceedings § 8-202 (1997), Mass. Ann. Laws. ch. 234A, § 4 (Law. Co-op. 1998), Miss. Code Ann. § 13-5-1 (1997), Mo. Rev. Stat. § 494.425 (1997), Neb. Rev. Stat. § 25-1601 (1998), N.H. Rev. Stat. Ann. § 500-A:6 (1997), N.J. Stat. § 2B:20-1 (1998), N.M. Rules Ann. § 14-110 (1997), 42 Pa. Cons. Stat. § 4502 (1997), S.C. Code Ann. § 14-7-810 (Law Co-op. 1997), S.D. Codified Laws Ann. § 16-13-10 (1998), Tex. Crim. Code Ann. art. 19.01 (1998), Utah Code Ann. § 78-46-7 (1998), Vt. Stat. Ann. tit. 4, § 962 (1998), V.I. Code Ann. tit. 4, § 471 (1998), W. Va. Code § 52-1-5a (1998).

to an impartial jury—and a fair trial—demand the same exclusion. By ignoring that rather basic principle, the trial court and the Supreme Court of Virginia deprived Petitioner of the full protection of his rights under the Sixth and Fourteenth Amendments. This Petition asks whether it is anything other than evident that, at the dawn of the twenty-first century, the value our nation places on human life and other rights has evolved to the point that a juror in a death case must be able to read the evidence and comprehend the language or symbols in which it is written. *See generally Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion) (the Eighth "Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society").

Article 1, section 8 of Virginia's Constitution provides that a criminal defendant has the right to twelve impartial jurors and that a defendant cannot be found guilty without the unanimous consent of the twelve-member jury. Va. Const. Art. I, § 8. In addition, Jackson is entitled to a jury trial under the Sixth Amendment to the United States Constitution. Whether the state or federal right to a jury trial is at issue is of little import; both provisions protect a right that is of "fundamental importance ...to the American system of criminal justice." *Ballew v. Georgia*, 435 U.S. 223, 239 (1978). Because of its critical role, any measure "that promises inaccurate and possibly biased decision making, that causes untoward differences in verdicts, and that prevents juries from truly representing their communities, attains constitutional significance." *Id.*

The trial court denied Jackson his jury right because the illiterate juror could not independently evaluate the documentary evidence presented at trial, nor could she function without depending on the unproven benevolence (or the prejudices and biases) of the other jurors. If an illiterate person is to serve on a jury, such a person should be limited to serving on juries in which the inability to read will assuredly be of no consequence. In a capital case with

written evidence, the inability to read prevents the illiterate from independently weighing the evidence, a matter of considerable consequence.

"[O]ur notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government." *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975) (quoting *Glasser v. United States*, 315 U.S. 60, 85-86 (1942)). Thus, in *Brown v. Allen*, 344 U.S. 443, 474 (1953), this Court declared that "[o]ur duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source reasonably reflects a cross-section of the population *suitable in character and intelligence for that civic duty*." (emphasis supplied). The introduction of "intelligence" to the jury pool is not a novel concept, nor is it an irrational one; it ensures that jurors will be able to evaluate the matters before them and render decisions consistent with the law and the evidence. To subject a criminal defendant to the judgment of those who lacked intelligent function would indeed dishonor the concept of trial by jury:

> Trial by jury in a court of law and in accordance with traditional modes of procedure after an indictment by grand jury has served and remains one of our most vital barriers to governmental arbitrariness. These elemental procedural safeguards were embedded in our Constitution to secure their inviolateness and sanctity against the passing demands of expedience or convenience.

Reid v. Covert, 354 U.S. 1, 10 (1957) (plurality opinion). If we are willing to eliminate basic intellectual function from our juries, we edge one step closer to arbitrary decision making in the name of convenience.

Confronting the issue of juror illiteracy for the first time, the Virginia Supreme Court concluded that "illiteracy does not automatically disqualify a person from serving as a

juror" in a criminal case as long as "the illiterate juror has essentially the same opportunity to review the written material in the case as the other jurors." (App. at 15a.) That conclusion—flawed in theory and in practice—violated Jackson's Constitutional right to a jury comprised of persons capable of independent review of the evidence, and it overrode his due process right to have a jury of twelve.

The right to trial by an impartial jury includes more than a jury free of bias; it promises twelve persons who are able to understand the evidence and the laws and to arrive at an independent judgment. *See Commonwealth v. Brown*, 231 Pa. Super. 431, 332 A.2d 828 (1974). If a juror cannot "comprehend and intelligently resolve the factual issues" at hand, the juror cannot be permitted to serve. *Commonwealth v. Susi*, 394 Mass. 784, 786, 477 N.E.2d 995, 997 (1985) (citations omitted).

In *People v. Trevino*, 826 P.2d 399, 401 (Colo. Ct. App. 1991), the Colorado Court of Appeals held that a defendant's right to a jury of twelve was violated when one juror forgot her hearing aid on the second day of trial and was unable to hear the testimony. In reaching its decision, the *Trevino* court explained:

> [A] juror cannot be aware of what she cannot hear. Thus, the juror here could not participate in meaningful discussions during the deliberative stage of the trial nor decide the case intelligently. The effect of the juror's inability to hear the testimony was tantamount to the juror not being in attendance for . . . the trial, thus denying the defendant the right to a jury of twelve.

Id. Mere attendance in the jury box is not sufficient to fulfill the Constitution's jury trial mandate.

In *Susi*, a Massachusetts court found that a trial judge abused her discretion in denying a defendant's challenge for cause of a blind juror. The Court reasoned:

> Fundamental to the right of an impartial jury is the requirement that jurors be competent and qualified. 'Trial by jury necessarily requires a jury which is able to comprehend and intelligently resolve the factual issues submitted to its verdict.'

Susi, 394 Mass. at 786-87, 477 N.E.2d at 997. If each juror is not capable of independent and intelligent judgment, the defendant has not received the process he is due. Indeed in Virginia, the Court of Appeals, in an unpublished decision affirmed by the Virginia Supreme Court concluded that "a juror's lack of proficiency with the English language renders the juror constitutionally disqualified from jury service if the juror is actually incapable of substantially comprehending the evidence and arguments. *Mason v. Virginia*, No. 0499-96-4, 1997 Va. App. LEXIS 423, at *3 (1997) (unreported), *aff'd* 255 Va. 505, 498 S.E.2d 921 (1998).[8]

In *Jackson*, however, the Virginia Supreme Court accepted the trial court's finding of the juror's illiteracy, but concluded that Petitioner's constitutional rights were not violated because it "assume[d] that the other jurors accurately read the documents to the illiterate juror." (App. at 15a.)

The Virginia Supreme Court's willingness to disregard the juror's illiteracy, and its unwillingness to require some showing that she was capable of meeting the minimal standards later articulated in *Mason*, ignored its own acknowledgment that the right to jurors who can independently review the evidence for themselves is

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[8] Although the Virginia Court of Appeals recognized the validity of the constitutional right that *Mason* asserted—in an opinion affirmed by the Virginia Supreme Court—the intermediate appellate court did not reverse Mason's conviction. Rather, both appellate courts deferred to the trial court's finding that the juror in question, who had been impaneled without objection, was sufficiently proficient in English to function independently.

fundamental. *Mason*, 255 Va. at 509, 498 S.E.2d at 923 (citing *Smith v. Phillips*, 455 U.S. 209, 217 (1982)). ("Indeed the United States Supreme Court has stated that '[d]ue process means a jury capable and willing to decide the case solely on the evidence before it'"). While the Sixth Amendment and Due Process rights are not a bargain of a perfect trial, neither are they empty promises to be satisfied with smoke and mirrors. On the contrary, the rights guaranteed by those provisions carry particular importance in death penalty prosecutions, *see Lowenfield*, 484 U.S. at 231, and consequently deserve heightened attention.

The federal court system already relies on an articulated minimum standard of juror qualification. More than a quarter century ago, the Congress enacted a statute requiring that every juror be able to "read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form." 28 U.S.C. § 1865(b)(2)(1998). Although minimal, Congress recognized that such standard was critical to achieving satisfactory jury performance. H.R. Rep. No. 1076, 90th Cong. (1968), *reprinted in* 1968 U.S.C.C.A.N. § 1792, 1795. Thus, it designed the standard to "eliminate all those who ought not be able to serve on a jury - the illiterate, the feebleminded, the insane, the decrepit, the infirm, the accused, and the criminal." *Id.* at 1796.

As one federal court has noted, the requirements of Section 1865 advance the "collective search for the truth not by one, but by all twelve. To have one or more [of the jurors] linguistically cordoned off from the debate would tend to cause some unacceptable attrition in the right to trial by jury proclaimed in . . . the Sixth amendment of the United States Constitution." *U.S. v. McDade*, 929 F. Supp. 815, 817 (E.D. Pa. 1996). Likewise, a juror who is cordoned off from the debate because of her inability to read the exhibits represents an unacceptable reduction of the number of jurors.

Several state courts have concluded that the right to a jury trial prohibits impaneling an illiterate juror. The Supreme Court of Mississippi held in 1972 that:

> the requirement that a juror be able to read and write is a reasonable and non-discriminatory regulation which operates equally against all persons tried by juries. No advantage is afforded to the state which is not also afforded to the defendant. This requirement is just as essential to the state's obligation to afford the accused a fair trial as it is to assure a fair trial for the state.

Wilson v. Mississippi, 574 So.2d 1324, 1331 (Miss. 1990) (quoting *Terrell v. State*, 267 So.2d 179, 180 (Miss. 1972)); *see also State v. Comeaux*, 252 La. 481, 211 So.2d 620 (1968). The Supreme Court of Kansas has also recognized that the decision to seat an illiterate juror can adversely affect the defendant's right to a fair trial, *State v. Ji*, 251 Kan. 3, 9, 832 P.2d 1176, 1184 (1992), because an illiterate person is, "for obvious reasons, ... unfit to serve" as a juror.[9] *Id.*

The majority of state legislatures and courts have determined that illiterate persons are not qualified to act as jurors. That majority, in addition to the considered judgment of the United States Congress, should be accepted as a "useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not." *Burch v. Louisiana*, 441 U.S. 130, 138 (1979) (near uniform judgment of the notion that a unanimous verdict is required in determining constitutional standard). Because of the widespread acknowledgment of the problem

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[9] Although Mississippi and Kansas, unlike Virginia, require literate jurors by statute, the high courts of those states have wisely noted that the need for literacy is not just the product of legislation; it is mandated by the concept of a "fair trial."

that illiteracy presents in the function of the American judicial system, Petitioner asks the Court to review whether a capital trial is a fair trial and is a jury trial within the meaning of the Sixth and Fourteenth Amendments when a juror is incapable of reading the evidence.

CONCLUSION

It is prayed that the Petition for Certiorari be granted.

Respectfully submitted,

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October 5, 1998

APPENDIX

CHAUNCEY JACOB JACKSON

v.

COMMONWEATH OF VIRGINIA.

Record Nos. 971720, 971721.

Supreme Court of Virginia.

April 17, 1998.

James O. Broccoletti (Jon M. Babineau; Zoby & Broccoletti; Doyle & Babineau, on brief), Norfolk, for appellant.

Pamela A. Rumpz, Assistant Attorney General (Richard Cullen, Attorney General, on brief), for appellee.

Present: CARRICO, C.J., COMPTON, LACY, HASSELL, KEENAN and KINSER, JJ., and WHITING, Senior Justice.

WHITING, Senior Justice.

In these appeals, we review a capital murder conviction, a sentence of death (Record No. 971720), and five other related felony convictions (Record No. 971721).

I. PROCEEDINGS

On September 1, 1994, 16-year-old Chauncey Jacob Jackson was arrested and incarcerated on charges of capital

murder and five other felonies.[1] The alleged crimes had all occurred the day before. On September 21, 1994, the Norfolk Juvenile and Domestic Relations District Court issued transfer orders pursuant to Code § 16.1-269.1, certifying Jackson to the circuit court for criminal proceedings as an adult on those charges.

On October 5, 1994, indictments were issued in the circuit court charging Jackson with the following six felonies: (1) the capital murder of Ronald Gene Bonney, Jr., while attempting to rob him (Code §§ 18.2-31(4), 18.2-10), (2) attempted robbery (Code §§ 18.2-58, 18.2-26), (3) and (4) two charges of the use of a firearm while committing the above-mentioned offenses (Code §§ 18.2-53.1, 18.2-10), (5) the conspiracy to commit a robbery (Code §§ 18.2-22, 18.2-58, 18.2-10), and (6) the receipt of stolen property (Code §§ 18.2-108, 18.2-95). The trial date was fixed and continued eight times, six times on Jackson's motion and two times on joint motion of Jackson and the Commonwealth.

During the 23-month interval between the date of the transfer order and August 21, 1996, when Jackson's trial began, it was discovered that indictments had been issued before the circuit court conducted the review of Jackson's transfer required by Code § 16.1-269.6. On June 23, 1995, after conducting the required review, a circuit judge other than the trial judge concluded that the applicable statutes had been complied with and authorized the Commonwealth to proceed against Jackson by indictment. However, Jackson was not indicted on these charges for the second time until December 6, 1995.

At the beginning of a bifurcated jury trial on August 21, 1996, Jackson was arraigned on the December 1995 indictments. The trial was conducted pursuant to the

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[1] Although Jackson's middle name is shown as "Jacob" in the pleadings and in many of the documents in the file, he described and spelled it as "Jabob" in his statements to the police.

provisions of Code §§ 19.2-264.3, -264.4, and -295.1, and Jackson was found guilty of all six charges. After hearing additional evidence, the jury fixed Jackson's punishment for the capital murder conviction at death, based on the "future dangerousness" predicate. Code § 19.2-264.2. After considering a report prepared by a probation officer pursuant to Code § 19.2-264.5, the court sentenced Jackson in accordance with the jury verdict in the capital murder case. Since he was a juvenile when the offenses were committed, the court sentenced Jackson on the remaining offenses in conformity with Code §§ 16.1-269.1 and -272 to terms of imprisonment aggregating 48 years. The court suspended eighteen years of the sentence for the conviction of receiving stolen goods, subject to 20 years' probation.

Pursuant to Code § 17-110.1(F), we have consolidated the automatic review of Jackson's death sentence with the appeal of right of his capital murder conviction. By order entered August 14, 1997, Jackson's appeal of his other convictions was certified from the Court of Appeals, Code § 17-116.06, and we have consolidated that appeal with the capital murder appeal and given them priority on our docket. Code § 17-110.2.

II. THE EVIDENCE

We review the evidence in the light most favorable to the Commonwealth, the prevailing party in the circuit court. *Roach v. Commonwealth*, 251 Va. 324, 329, 468 S.E.2d 98, 101, *cert. denied*, 519 U.S. ----, 117 S.Ct. 365, 136 L.Ed.2d 256 (1996).

A. Guilt Phase

The day after Bonney's murder, Jackson made a series of four oral statements to police investigators. The first statement was not recorded, but the remaining three statements were recorded and transcribed. The following facts appear in one or more of those statements.

On the evening of August 31, 1994, Jackson was riding in a Jeep Cherokee driven by his friend, Rashad Vick. Vick stopped the vehicle when three other friends, standing near a so-called "dope house" on Vine Street, waved at them. One of the three friends suggested robbing a man, later identified as Ronald Gene Bonney, Jr., who was within sight, seated in the driver's seat of a Chevrolet Blazer parked nearby. Jackson and Vick agreed.

Accordingly, two of the group acted as "lookouts." Jackson procured a .25 caliber Beretta handgun from the Jeep. Accompanied by Calvin Outlaw and Angelo Artis, the other two members of the group, Jackson approached the parked vehicle. Outlaw placed his leg against the driver's door, next to Bonney, and later took the keys from the ignition switch when Bonney tried to drive away. Jackson, armed with the handgun, entered the front seat of the vehicle from the passenger's side, and, according to his last statement, Jackson told Bonney to "[g]ive it up." Bonney then "started patting his pockets and said, 'Give what up?'.... And then [Bonney] said, 'Shoot me, you little f--ker.' And then I cocked the gun, and then Angelo stepped up, and the gun jammed, and I tried to unjam it, and it shot." The gun fired three bullets which hit Bonney in the chest and arm and caused his death.

Jackson fled in the Jeep. He was arrested late that night and brought to police investigators for an interview at 7:20 a.m.

B. Penalty Phase

The Commonwealth introduced evidence of Jackson's criminal record. It began with a finding that he was not innocent of the theft of a car when he was 13 years old and included, a few months later, a finding that he was not innocent of receiving stolen property. When Jackson was 14 years old, he was also found not innocent of possession of cocaine. Additionally, Jackson was found not innocent of a number of offenses dealing with motor vehicles, such as unauthorized use of an inspection sticker, driving without a

license, altered license plates, and speeding. Many of the offenses were committed while Jackson was on probation for earlier offenses.

Jackson had been incarcerated for more than 13 months on the present charges when he was released on bond on October 24, 1995. In December 1995, while free on bond awaiting trial for the subject offenses, Jackson was involved with several other persons in the unlawful entry of a house in Jackson's neighborhood, and later convicted of the following 14 felony charges arising therefrom: statutory burglary, four abductions, robbery, attempted robbery, and seven charges of use of a firearm during the commission of those crimes.

Additionally, an inmate testified that Jackson, again incarcerated after the December 1995 incidents, assaulted him in jail on February 9, 1996. This assault occurred less than two months after Jackson had committed the December 1995 crimes and before his capital murder trial in August and September 1996.

Jackson called as witnesses Dr. Evan S. Nelson and Dr. Thomas Pasquale, both forensic psychologists, who had examined and evaluated him. Both testified that Jackson had an antisocial personality disorder, basing their diagnosis in part on Jackson's history of aggressive acts. Dr. Nelson assessed Jackson as having a high number of "risk factors" for violent conduct and Dr. Pasquale at one time had evaluated Jackson as being a "moderate to severe [assault] risk." However, both psychologists declined to say that Jackson would be a future danger to society. Dr. Nelson felt that an affirmative answer to the question required a psychologist to "predict with certainty that someone will commit an offense of violence in the future." Dr. Pasquale "follow[ed] the guidelines of the American Psychological Association" which state that "psychologists are best not to make such predictions due to the fact that we have not developed the circumstances sufficiently to be able to do so."

Although both psychologists testified that an antisocial personality disorder cannot be cured, Dr. Pasquale opined that a person with such a disorder could be "amenable to management." On the other hand, Dr. Nelson thought that Jackson's history of continued violent acts, especially when under the constraints of probation, bond, and incarceration awaiting trial on these charges, was a "very negative indicator for how much change [from his violent acts against Bonney] we can expect from him over the years."

Jackson's mother and grandmother, with whom Jackson lived, testified that Jackson had been a normal child, and that they had a good relationship with him. The grandmother said that Jackson had been a good boy "until, you know, he got with the wrong bunch of kids." And the mother testified that Jackson received a "long-term" suspension from school because, while waiting in the school office for some sort of a disciplinary interview, Jackson had told another student that he would kill "somebody" if he were suspended from school.

Neighbors and persons who had contact with Jackson when he was living at home described him as "respectful," "polite," and "courteous." A member of Jackson's community also testified that Jackson called her to ask "how [she] was doing" after an operation.

One of the members of the family that was burglarized and robbed by Jackson and other intruders in December 1995 testified that she knew Jackson and that he "just stood there" and "had some tears in his eyes" during the robbery. However, she also testified that Jackson had a gun and, like the other intruders, was wearing a hood that partially masked his face.

III. WAIVER OF CERTAIN ASSIGNMENTS OF ERROR

Jackson did not brief, and has therefore waived, assignments of error 6, 9, 12, 21, 29, and 32. Rule 5:27; Rule 5:17(c)(4); *Williams v. Commonwealth*, 248 Va. 528, 537,

450 S.E.2d 365, 372 (1994), *cert. denied*, 515 U.S. 1161, 115 S.Ct. 2616, 132 L.Ed.2d 858 (1995). [2]

IV. ISSUES PREVIOUSLY DECIDED

In the remaining assignments of error, Jackson raises a number of issues which we have previously decided adversely to his contentions. Because he offers no persuasive reasons to modify our previous conclusions, and we perceive none, we will adhere to our previous rejections of those contentions. Hence, we will not discuss these contentions beyond identifying the assignments of error to which we believe each contention relates and citing representative cases in which those arguments were expressly rejected.

The death penalty constitutes cruel and unusual punishment. Rejected in *Goins v. Commonwealth*, 251 Va. 442, 453, 470 S.E.2d 114, 122, *cert. denied*, 519 U.S. —, 117 S.Ct. 222, 136 L.Ed.2d 154 (1996); *Joseph v. Commonwealth*, 249 Va. 78, 82, 452 S.E.2d 862, 865, *cert. denied*, 516 U.S. 876, 116 S.Ct. 204, 133 L.Ed.2d 137 (1995).

"[I]mposition of the death penalty based on 'future dangerousness' is unconstitutional because the use of [a] prior unadjudicated factor is permitted without any requirement that the conduct be established by any standard of proof." Rejected in *Breard v. Commonwealth*, 248 Va. 68, 74-75, 445 S.E.2d 670, 675, *cert. denied*, 513 U.S. 971, 115 S.Ct. 442, 130 L.Ed.2d 353 (1994); *Satcher v. Commonwealth*, 244 Va. 220, 228, 421 S.E.2d 821, 826 (1992), *cert. denied*, 507 U.S. 933, 113 S.Ct. 1319, 122 L.Ed.2d 705 (1993); *Stockton v. Commonwealth*, 241 Va. 192, 210, 402 S.E.2d 196, 206, *cert. denied*, 502 U.S. 902, 112 S.Ct. 280, 116 L.Ed.2d 231 (1991).

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[2] It has been difficult to ascertain which assignments of error have been briefed or which of the 37 assignments of error relate to the 29 questions presented by Jackson. Jackson has not given "a clear and exact reference to the particular assignment of error to which each question relates" as required by Rule 5:27 and 5:17(c)(4). Indeed, he rarely refers to the assignments of error by number in the arguments in his brief.

The statute and the court's instructions in conformity thereto which permit imposition of the death penalty based on "future dangerousness" are unconstitutional because they are "incomplete and vague" and do not provide "meaning and guidance." Rejected in *Williams v. Commonwealth*, 248 Va. at 535, 450 S.E.2d at 371.

Allowing the introduction of evidence of Jackson's convictions for other crimes in the sentencing phase to establish future dangerousness violates the double jeopardy clause of the Fifth Amendment of the United States Constitution. Rejected in *Mickens v. Commonwealth*, 247 Va. 395, 404, 442 S.E.2d 678, 684-85, *vacated on other grounds*, 513 U.S. 922, 115 S.Ct. 307, 130 L.Ed.2d 271 (1994); *Stewart v. Commonwealth*, 245 Va. 222, 229, 427 S.E.2d 394, 400, *cert. denied*, 510 U.S. 848, 114 S.Ct. 143, 126 L.Ed.2d 105 (1993); *Yeatts v. Commonwealth*, 242 Va. 121, 126, 410 S.E.2d 254, 258 (1991), *cert. denied*, 503 U.S. 946, 112 S.Ct. 1500, 117 L.Ed.2d 639 (1992).

This Court's method of reviewing the proportionality of the sentence by considering the records only of those murder cases in which sentences of death were imposed and not of those murder cases in which lesser sentences were imposed is invalid. Rejected in *Stamper v. Commonwealth*, 220 Va. 260, 283-84, 257 S.E.2d 808, 824 (1979), *cert. denied*, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980) ("test is not whether a jury may have declined to recommend the death penalty in a particular case but whether generally juries in this jurisdiction impose the death sentence for conduct similar to that of the defendant").

V. PRETRIAL MATTERS

A. Discovery of Exculpatory Evidence

Jackson complains that the trial court did not "order appropriate relief" when it failed to require the Commonwealth to produce "exculpatory statements, evidence or admissions," and to "ensure that no such evidence existed;

or, in the event that it did exist, that it be provided for counsel for the defendant." However, he does not state in what respects the court failed to provide such relief or how Jackson was prejudiced thereby.

As the Commonwealth observes on brief, the record indicates that Jackson was supplied with all exculpatory evidence within the Commonwealth's knowledge, which he used at trial. Accordingly, we find no merit in this contention.

B. Suppression of Jackson's Statements to Police

Jackson does not dispute the sufficiency of the Commonwealth's evidence indicating that before his in-custody interrogation by the police, he was fully advised of his Fifth Amendment rights as required by *Miranda v. Arizona*, 384 U.S. 436, 467-73, 479, 86 S.Ct. 1602, 1624-27, 1630, 16 L.Ed.2d 694 (1966). Although a juvenile, Jackson was not unfamiliar with these rights as evidenced by his statement to Investigator John R. Malbon that he had previously been arrested and informed of his legal rights "about three times." Malbon testified that while being advised of his rights, Jackson appeared "calm" and "alert." In any case, Jackson does not contend that he failed to understand either his rights or the effect of a waiver but rather that the police engaged in a strategy designed to capitalize on Jackson's youth and isolation. His claim is that the police interrogated him for "approximately 25 to 28 hours" and placed him "in a situation where he was deprived of sleep, deprived of the advice and counsel of his mother, [and he] was placed in a small windowless interrogation room for hours on end, and denied repeated access by his parent to him despite her best efforts."

We find no support in the record for Jackson's statement that he was deprived of sleep and interrogated for 25 to 28 hours. Jackson was brought to the Norfolk Police Department on the night of Bonney's murder and put in a temporary holding cell. Although he was awakened several times during the night and offered food, water, and use of the bathroom,

Jackson was permitted to sleep until 7:05 the following morning.

The investigators interrogated Jackson four separate times between 7:20 a.m. and 1:59 the next morning. These sessions, together with related contacts setting up the interviews and permitting Jackson to review the written transcripts of the preceding two interrogations, totaled four hours and thirty- eight minutes. The longest uninterrupted period of contact with Jackson was one hour and twenty minutes. After each contact, Jackson was left alone either in a locked cell or a locked interview room while police investigated the accuracy of his statements.

Jackson decided not to testify at the pretrial hearing on the admissibility of his confession and called his mother, Carol Lee Jackson, as his only witness on this subject. Her testimony focused primarily on the alleged delay by the police in permitting her to see her son.

Jackson does not claim that he asked for the presence of his mother,[3] but suggests that police interrogation of a 16-year-old juvenile without the presence of one of his parents is a violation of his constitutional rights. In *Wright v. Commonwealth*, 245 Va. 177, 185-86, 427 S.E.2d 379, 385-86 (1993), *vacated on other grounds*, 512 U.S. 1217, 114 S.Ct. 2701, 129 L.Ed.2d 830 (1994), we rejected the contention of a juvenile capital murder defendant that his confession was involuntary in part because his mother was not present at the interrogation. Like Jackson, Wright had been advised of his rights when arrested on prior occasions and had knowingly waived those rights before making the statement at issue. Perceiving no significant difference

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[3] Jackson did ask whether his mother was in the building during his interrogation and was told that she was not. Therefore, we do not consider the effect, if any, of a police officer's failure to honor a request by a juvenile for the presence of a parent or guardian during an in-custody interrogation.

between the situation in *Wright* and the situation in this case, we reject Jackson's suggestion.

The alleged police delay in honoring Ms. Jackson's request to see her son is irrelevant to the issue of the voluntariness of his statements. As the United States Supreme Court observed in *Moran v. Burbine*, 475 U.S. 412, 422, 106 S.Ct. 1135, 1141, 89 L.Ed.2d 410 (1986), "[e]vents occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right." In *Moran*, the police failed to tell a suspect in custody that his attorney was trying to reach him. *Id.* at 433, 106 S.Ct. at 1147. Under these circumstances, the Constitution of Virginia provides no greater protection than the Fifth Amendment of the United States Constitution. *See Walton v. City of Roanoke*, 204 Va. 678, 682, 133 S.E.2d 315, 318 (1963). Hence, we find no violation of Jackson's rights under either constitution because of the failure of the police to permit Ms. Jackson immediate access to her son. For these reasons, we conclude that Jackson's statements were the product of his free will, made after a knowing, voluntary, and intelligent waiver of his Miranda rights. *See Wright*, 245 Va. at 185-86, 427 S.E.2d at 385-86.

C. Change of Venue

Jackson complains that the trial court denied him the opportunity to present evidence of pre-trial publicity. Jackson further alleges that the trial court had "clearly made up her mind on the issue of pre-trial publicity, and ultimately on the motion for change of venue."

Contrary to these claims, the record shows that the trial court merely told Jackson's counsel that his oral proffer was insufficient to schedule a hearing on this issue at that time. However, the court permitted counsel a period of more than three weeks in which to produce affidavits indicating that an impartial jury could not be selected in Norfolk, after which the court would consider fixing a date to hear evidence from

both sides on that issue. No affidavits were produced and, in fact, Jackson filed no newspaper articles or other information with the court.

Thus, the court was not presented with evidence sufficient to overcome the "presumption that a defendant can receive a fair trial from the citizens of the county or city in which the offense occurred." *Stockton v. Commonwealth*, 227 Va. 124, 137, 314 S.E.2d 371, 379, *cert. denied*, 469 U.S. 873, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984). Hence, we reject this contention.

D. Jury Matters

1. Refusal to strike entire venire

As prospective members of the jury sat in the courtroom completing jury questionnaires, the court conducted sentencing proceedings in an unrelated matter and explained to those parties that, although a defendant in a pre-1995 case may be eligible for parole, an exact calculation of how much time he would serve was impossible. Jackson asked the court to strike the panel because this explanation was made within the hearing of his venire.

As soon as Jackson raised the issue, the court asked the entire venire who among them had heard its discussion. Although 20 panel members indicated that they had heard parts of the court's explanations, none of them was among the venire comprising panel members from whom the jury was actually selected. Under these circumstances, we find no error in the trial court's refusal to strike the entire venire.

2. Peremptory strikes by the Commonwealth

In *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S.Ct. 1712, 1719, 90 L.Ed.2d 69 (1986), the United States Supreme Court held that purposeful discrimination based on race in selecting jurors violates the Equal Protection Clause. If an accused makes a *prima facie* showing of the prosecution's use of peremptory strikes on the basis of race, the burden shifts to

the prosecution to articulate race-neutral reasons for such strikes. *Chichester v. Commonwealth*, 248 Va. 311, 323, 448 S.E.2d 638, 646 (1994), *cert. denied*, 513 U.S. 1166, 115 S.Ct. 1134, 130 L.Ed.2d 1095 (1995).

In exercising its peremptory strikes, the Commonwealth removed four black members of the venire. When challenged as to the reasons for three of the four strikes, the Commonwealth gave the following explanations: one prospective juror had "fairly recent DUI and CCW convictions," another's son had been convicted of firearm possession and for selling drugs, and the third was a social services employee. One of the prosecutors with experience with social services employees found them to be "fairly liberal" and without exception possessed of a belief that treatment rather than punishment was a more appropriate way of dealing with juvenile offenders.

Jackson, who is black, does not attack the racial neutrality of these statements; instead he claims that they were pretextual explanations designed to mask racially discriminatory reasons for the peremptory strikes. Concluding that Jackson has failed to carry his burden of showing that the court abused its discretion in accepting those explanations, we find no merit in this contention. *See James v. Commonwealth*, 247 Va. 459, 461-62, 442 S.E.2d 396, 398 (1994).

3. Refusal to grant Jackson's strikes for cause

In reviewing a trial court's action in denying a motion to strike prospective jurors for cause, absent manifest error, we defer to the trial court's exercise of discretion. *Roach*, 251 Va. at 343, 468 S.E.2d at 109; *Yeatts v. Commonwealth*, 242 Va. at 134, 410 S.E.2d at 262. Applying this standard, we find no error in the trial court's refusal to sustain Jackson's motions to strike the following three prospective jurors for cause.

Robert Lee was one of a group of five prospective jurors present when another member of the group asked whether the jury would be able to "say no to the death penalty and yes to life but life without parole?" The court responded:

> No. The jury has very limited things they're told to do. They can only do what they're told to do. They can say life or they can say death. That's all they're allowed to do.

The court offered to discuss the matter further with the five members of the venire and to ask them whether her explanation had affected the venire members in any way prejudicial to Jackson. Jackson declined both offers. Hence, he waived any objection he may have had to the court's response.

Prospective juror Elizabeth Huffman's first cousin was the wife of the Commonwealth's attorney for the City of Norfolk. The Commonwealth was represented throughout the trial by two assistant Commonwealth's attorneys; the Commonwealth's attorney signed none of the pleadings and did not appear at trial.

Ms. Huffman testified that she generally saw her cousin's husband only twice a year at family gatherings and that her limited association with him would not affect her ability to give Jackson a fair trial. However, Jackson claims that, because she indicated that these family gatherings were at Christmas and other important holidays, she "gave the insurmountable appearance of bias for a juror in a capital murder case." We do not agree.

The relationship Ms. Huffman had with the Commonwealth's attorney does not disqualify her from sitting on this jury. *See Roach*, 251 Va. at 343, 468 S.E.2d at 109 (Commonwealth's attorney in capital murder case formerly represented prospective juror in matter and prospective juror still regarded him as his "personal attorney"); *Wise v. Commonwealth*, 230 Va. 322, 325, 337 S.E.2d 715, 717 (1985), *cert. denied*, 475 U.S. 1112, 106 S.Ct. 1524, 89

L.Ed.2d 921 (1986) (Commonwealth's attorney "golfing buddy" and "long standing" friend of prospective juror).

An illiterate juror was seated over Jackson's objection. Recognizing that illiteracy does not disqualify a juror under any statute in Virginia, Jackson contends that seating such a person as a juror violates "his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution" and the "strong public policy against seating illiterate jurors." Jackson claims that such a policy is reflected in 28 U.S.C. § 1865, which requires a juror in the federal courts to be able to read, write, and understand the English language. Jackson argues that "he had the benefit of at most, eleven jurors [and] [i]t is unknown what one juror or more, may have said to [the illiterate juror] or whether they made any mistakes, intentional or unintentional, in reading the written materials."

We do not agree with Jackson. In Virginia, illiteracy does not automatically disqualify a person from serving as a juror if the trial court takes steps to assure that the illiterate juror has essentially the same opportunity to review the written material in the case as the other jurors. Here, the record indicates that virtually all the documentary evidence, the court's instructions to the jury, and the verdict forms were read to the jury, and that the illiterate juror was able to have any documents read to her by the other jurors. And we assume that the other jurors accurately read the documents to the illiterate juror.

E. Circuit Court Review of Juvenile Court Transfer Proceedings

Jackson raises a number of issues stemming from the nine-month period before the circuit court reviewed the juvenile court's transfer order.

As relevant, Code § 16.1-269.6(B) in effect in September 1994 provided that:

> The circuit court shall, within a reasonable time after receipt of the case from the juvenile court (i)

> examine all such papers, reports and orders; (ii) if either the juvenile or the attorney for the Commonwealth has appealed the transfer decision, conduct a hearing to take further evidence on the issue of transfer, to determine if there has been substantial compliance with § 16.1-269.1, ... and (iii) enter an order either remanding the case to the juvenile court or advising the attorney for the Commonwealth that he may seek an indictment.

As we have noted earlier, there was no such review before the October 1994 indictments were returned. The review occurred on July 23, 1995.

Jackson maintains that the court should have sustained his motion to quash the October 1994 indictments on the ground that they were issued before the circuit court had entered its July 1995 order authorizing the Commonwealth to proceed by indictment against him. The Commonwealth responds that no such review was required in this case because neither party appealed the transfer order.

We do not agree with the Commonwealth. The statute clearly required this review, even if neither party filed an appeal to the juvenile court's transfer order. If such an appeal is filed, the statute required the circuit court to schedule a hearing in addition to its review. [4]

Accordingly, we conclude that the circuit court had no jurisdiction to try Jackson on the October 1994 indictments. Even so, the court had jurisdiction over Jackson following the required circuit court review of the transfer order and it could and did try him on the indictments issued thereafter.

This brings us to Jackson's contentions that the court should have sustained his motion to dismiss the December

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[4] The statute presently in effect does not require the review if the transfer decision is not appealed. Code § 16.1-269.6(B); II Acts of Assembly 1996, c. 755, p. 1338.

1995 indictments. The Commonwealth's attorney sought and obtained those indictments in accordance with the circuit court's authorization order entered after its transfer review in June 1995. Jackson reasons that the circuit court never acquired jurisdiction over him because it failed to act upon the juvenile court's transfer order within a reasonable time, as required by Code § 16.1- 269.6(B), and he never had the benefit of a subsequent and more current juvenile court transfer review prior to his December 1995 indictments. We find no merit in either contention.

Although the requirement of a transfer review is jurisdictional, the time within which that review must be made is procedural. *Jamborsky v. Baskins*, 247 Va. 506, 511, 442 S.E.2d 636, 638-39 (1994). In *Jamborsky*, we concluded that, absent a showing of prejudice to the juvenile's due process rights, a procedural error in conducting the review three days after the then statutorily specified 21-day period for review, did not invalidate the review. *Id.* at 509-11, 442 S.E.2d at 638.

Here, the nine-month period before conducting the review was unreasonable and constituted a procedural error in failing to comply with the statute in effect at that time. However, Jackson does not claim that he was prejudiced by the delay in conducting the review. Indeed, the record indicates that Jackson treated the case as properly before the circuit court and continued his preparation in the same manner before and after he was told on October 24, 1995, of the circuit court's failure to conduct the review of his transfer order within a reasonable time. The record fails to disclose that the procedural error prejudiced Jackson in such a manner as to constitute a denial of due process. *See id.* Accordingly, we find no merit in this contention.

F. Violation of Rights to a Speedy Trial

This brings us to Jackson's contention that his constitutional and statutory rights to a speedy trial have been violated. Jackson's trial did not begin within the periods

fixed for a speedy trial by Code § 19.2-243 and it may not have begun within a period considered as constitutionally permissible under normal circumstances.

However, we find no violation of those rights in these cases. As we have noted, every continuance was either on Jackson's motion alone or a motion he made jointly with the Commonwealth. Under these circumstances, we conclude that Jackson has waived his statutory and constitutional rights to a speedy trial. *O'Dell v. Commonwealth*, 234 Va. 672, 681, 364 S.E.2d 491, 496, *cert. denied*, 488 U.S. 871, 109 S.Ct. 186, 102 L.Ed.2d 154 (1988); *see also Barker v. Wingo*, 407 U.S. 514, 534, 92 S.Ct. 2182, 2194, 33 L.Ed.2d 101 (1972).

Nevertheless, since the circuit court had no jurisdiction to try him on the October 1994 indictments, Jackson contends that the waivers of his speedy trial rights before his release on bond in October of 1995 were as void as those indictments. In deciding whether to transfer Jackson for proper criminal proceedings, Code § 16.1-269.1(2) requires the juvenile court to find "that probable cause exists to believe that the juvenile committed the delinquent act as alleged." The delinquent acts alleged were the commissions of six felonies referred to earlier. Accordingly, Jackson's speedy trial rights attached upon that determination of probable cause. *Compare* Code § 16.1-269.1(2) with Code § 19.2-243 (speedy trial rights of an accused attach upon general district court's finding of probable cause "to believe that the accused has committed a felony").

It was those rights that Jackson waived in his motions for a continuance of the trial, not any right having to do with the validity of the indictments returned against him in the circuit court. For these reasons, we reject this contention.

VI. THE TRIAL

A. Guilt Phase Issues

1. Testimony of Lakisha Spruill

Shortly before the expected close of the Commonwealth's case in chief, it appeared that a recess until the next day would be required to obtain the presence of a witness for Jackson. To conserve trial time, the court suggested that the Commonwealth rest its case except for some evidence relating to Jackson's failure to conform to court orders to appear in criminal matters and his flight to avoid arrest on an unrelated motor vehicle charge. Defense counsel responded that "I think procedurally we cannot do that." When the court responded that it was "a perfectly acceptable procedure," defense counsel made and argued the motion to strike, which the court considered and denied.

The next day, the Commonwealth called Lakisha Spruill, an eyewitness to Jackson's encounter with Bonney. Jackson objected to this action on the ground that the Commonwealth had rested its case. Jackson did not claim that he would be surprised by Spruill's testimony or that he had not talked to her about her testimony. In fact, he had summoned her as a witness. The court overruled the objection, assigning a number of reasons for its action, one of which was that it had the discretion to vary the order of trial.

Jackson argues that he was prejudiced by the court's action (1) in requiring him to argue the motion to strike in which he pointed out the lack of corroboration of Jackson's attempted robbery of Bonney before the Commonwealth had actually rested its case, and (2) in permitting Spruill to testify after Jackson had made his motion to strike.

In the absence of a showing of prejudice, a trial court may, in the exercise of its discretion, permit the Commonwealth to reopen its case after it has rested and the defendant has moved to strike the evidence. *Hargraves v. Commonwealth*, 219 Va. 604, 608, 248 S.E.2d 814, 816-17

(1978). We will not reverse such a ruling, absent an abuse of discretion. *Id.* Under the circumstances of this case, and without necessarily approving the procedure followed, we are unable to say that the court abused its discretion in permitting the Commonwealth to call Spruill as a witness after it had rested its case. Nor can we say that the trial court erred in holding that Jackson was not prejudiced by its action.

2. Rulings on sufficiency of evidence

Jackson contends that the court erred in overruling his motions to strike made at the conclusion of the Commonwealth's case and after both parties had rested their case in the guilt phase because the Commonwealth's evidence was insufficient to convict him of the crime of attempted robbery. He bases his claim upon the Commonwealth's alleged failure to sustain its burden of proving that this crime has been committed (the *corpus delicti). Maughs v. City of Charlottesville*, 181 Va. 117, 120, 23 S.E.2d 784, 786 (1943) (Commonwealth must prove *corpus delicti* in every criminal prosecution); *Nicholas v. Commonwealth*, 91 Va. 741, 750, 21 S.E. 364, 366- 67 (1895) (Commonwealth's burden to establish *corpus delicti*); *see also Epperly v. Commonwealth*, 224 Va. 214, 228-29, 294 S.E.2d 882, 890-91 (1982).

Jackson's statements, as successively amended, show clearly that, pursuant to the agreement with his friends, Jackson retrieved the .25 caliber handgun from the Jeep for the purpose of robbing Bonney, and that, during the robbery attempt, when Bonney refused to give him his money, Jackson stepped out of the vehicle and fired the gun three times, killing Bonney. [5]

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[5] The jury was not required to accept Jackson's statement that the gun fired accidentally while he was attempting to clear a jam. In fact, the pistol was fired three times at some distance from Bonney and a firearms expert testified not only that the gun would not fire when jammed but also that the trigger had to be pulled each time before the gun would fire a single bullet.

While Jackson recognizes that his statements tend to show the *corpus delicti* of attempted robbery, he argues correctly that the *corpus delicti* cannot be established solely by his uncorroborated statements. *Wheeler v. Commonwealth*, 192 Va. 665, 669, 66 S.E.2d 605, 607 (1951). However, only slight corroboration of an accused's statements is required to establish the *corpus delicti* when the accused fully confesses that he committed the crime. *Clozza v. Commonwealth*, 228 Va. 124, 133, 321 S.E.2d 273, 279 (1984), *cert. denied*, 469 U.S. 1230, 105 S.Ct. 1233, 84 L.Ed.2d 370 (1985); *Lucas v. Commonwealth*, 201 Va. 599, 603, 112 S.E.2d 915, 918 (1960).

Jackson's confession of the attempted robbery and murder of Bonney was corroborated in many respects. The passenger who came to the scene in Bonney's Blazer testified that, after discussing where to buy crack cocaine, Bonney and the passenger went to a house in Norfolk where the passenger knew he could buy drugs. When they arrived, the passenger directed Bonney to wait in the Blazer while he went into the house to make the purchase. Lakisha Spruill, an eyewitness who was seated on the porch of a house next door, saw the passenger leave the Blazer and enter the house while the driver remained in the Blazer. Spruill, who had known Jackson for some time, saw him get into the passenger's side of the Blazer, talk to the driver, and the "[n]ext thing I heard was gunshots."

The circumstantial evidence at the scene of the murder also corroborated Jackson's statements. A police investigator identified Outlaw's palm print on the driver's door of Bonney's vehicle and also testified that the keys to Bonney's vehicle were not found in the Blazer, supporting Jackson's statement that Outlaw had reached into the car and removed the keys to prevent Bonney from driving away.

In our opinion, these circumstances corroborate Jackson's confession that he had killed Bonney during an attempted robbery. The evidence demonstrates that the defendant and a confederate converged upon a stranger and

engaged in conduct designed to prevent the stranger from fleeing while the defendant spoke to him and carried a loaded pistol. This corroborating evidence is consistent with a reasonable inference that Jackson was attempting to rob Bonney when he shot him. Indeed, this corroborating evidence is more consistent with the commission of the offense than it is with its non-commission. *See Wright v. Commonwealth*, 245 Va. at 194, 427 S.E.2d at 390 (confession to attempted rape corroborated by discovery of victim's underpants which had been removed and were found at crime scene); *cf. Phillips v. Commonwealth*, 202 Va. 207, 212, 116 S.E.2d 282, 285 (1960) (corroborating evidence "just as consistent with non-commission of the offense as it is with its commission").

B. Penalty Phase Issues

1. Subjecting 16-year-old defendants to death penalty

Jackson, who had attained his 16th birthday only six weeks before the offenses occurred, contends that execution of 16-year-old defendants is not authorized by statute in Virginia. According to him, in *Stanford v. Kentucky*, 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989), the United States Supreme Court made it "very clear that it is up to each state to decide the minimum age for execution" and "provide[d] that each state must enact [death penalty statutes] with great specificity, especially dealing with juveniles, in order to allow for constitutionally sound punishments." Since Code §§ 18.2-31, 19.2-264.2 and -264.5 do not specifically provide for the imposition of the death penalty on juveniles convicted of capital murder, Jackson concludes that the death penalty cannot be imposed upon him. We do not agree.

Under the provisions of Code §§ 16.1-269.1 and -272, juveniles over the age of 14 years are, after proper proceedings in juvenile court and circuit court, subject to trial and possible punishment as an adult. Indeed, in the statute in effect at the time of the crime, the legislature provided for

transfer hearings in the juvenile court when such a juvenile is charged with capital murder. Code § 16.1-269.1(B). In our opinion, Code § 16.1-269.1 addresses the prosecution and punishment of juveniles in as much detail as the similar Kentucky and Missouri statutes which are acknowledged in *Stanford* as sufficient to authorize those states to impose the death penalty upon juveniles 16 or 17 years of age.

Jackson also argues that imposition of the death penalty upon a 16-year-old juvenile constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. In *Stanford*, the Court stated, "[w]e discern neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age." 492 U.S. at 380, 109 S.Ct. at 2980.

And we discern no such consensus in Virginia, as evidenced by its statutes subjecting juveniles over the age of 14 to punishment as adults. Code §§ 16.1-269.1, -272. Therefore, we conclude that a 16-year-old person who is convicted of capital murder may be subjected to capital punishment.

2. Psychological evaluation under Code § 19.2-264.3:1(F)(1)

Pursuant to the provisions of Code § 19.2-264.3:1(E), Jackson gave notice of his intent to present psychological evidence on the issue of mitigation of punishment during the penalty phase of the trial. In response, the Commonwealth requested the court to order Jackson to submit to a court-ordered examination by a psychologist designated by the court as provided in Code § 19.2-264.3:1(F)(1) in the following relevant language:

> If the attorney for the defendant gives notice pursuant to [Code § 19.2- 264.3:1(E)] and the Commonwealth thereafter seeks an evaluation concerning the existence or absence of mitigating circumstances relating to the defendant's mental

> condition at the time of the offense, the court shall appoint one or more qualified experts to conduct such an evaluation. The court shall order the defendant to submit to such an evaluation, and advise the defendant on the record in court that a refusal to cooperate with the Commonwealth's expert could result in exclusion of the defendant's expert evidence.

The succeeding paragraph states in pertinent part:

> If the court finds ... that the defendant has refused to cooperate with an evaluation requested by the Commonwealth, the court may admit evidence of such refusal or, in the discretion of the court, bar the defendant from presenting his expert evidence.

Code § 19.2-264.3:1(F)(2).

Over Jackson's objection, the court ordered him to submit to an evaluation by Dr. Nelson, a forensic psychologist, appointed under the provisions of these statutes. Jackson submitted to the evaluation. Although Jackson, not the Commonwealth, called Dr. Nelson as a witness in his own behalf in the penalty phase of the trial, he complains that the court erred in several respects in ordering his evaluation by Dr. Nelson.

First, he contends that the evaluation should not have been ordered. According to Jackson, the statute violated his Fifth Amendment rights against self-incrimination and his Sixth Amendment rights to a fair trial because the statute required him to cooperate with a court-appointed psychiatrist or suffer the possibility that his expert evidence would be barred. We rejected similar contentions in *Stewart v. Commonwealth*, 245 Va. at 243-44, 427 S.E.2d at 407-08, and we apprehend no reason to modify our opinion on those issues.

Second, Jackson maintains that, in ordering the evaluation, the court failed to warn Jackson of the

consequences of his failure to cooperate and ruled erroneously that Dr. Nelson could testify in the penalty phase even though Jackson never called his own expert on the issue of mitigation. We do not consider either contention because Jackson called Dr. Nelson as his own witness. A defendant in a criminal case cannot take advantage of an alleged error he has injected into the record. *Saunders v. Commonwealth*, 211 Va. 399, 400, 177 S.E.2d 637, 638 (1970).

Nevertheless, Jackson claims that the court erroneously "allowed Dr. Nelson to offer an opinion on Jackson's future dangerousness," which was "an opinion on the ultimate issue of fact." We do not agree for two reasons.

First, Dr. Nelson merely testified as to the risk factors associated with violence that were exhibited in Jackson's personality and caused him to diagnose Jackson as suffering from an antisocial personality disorder. Dr. Nelson testified further that Jackson exhibited more of the risk factors for future violent acts "than many of the other [criminal] defendants I have evaluated." Dr. Nelson quantified neither the extent of those factors nor the probability of Jackson's future dangerousness and he did not opine that Jackson would be a danger in the future. Jackson recognizes this in his later argument that Dr. Nelson "could not say that Jackson would be a danger in the future."

Second, even if Dr. Nelson had expressed an opinion of Jackson's "future dangerousness," such evidence would not have constituted an opinion as to the ultimate issue in this case. That issue is whether Jackson should be sentenced to death or imprisoned for life. *Payne v. Commonwealth*, 233 Va. 460, 469- 70, 357 S.E.2d 500, 506, *cert. denied*, 484 U.S. 933, 108 S.Ct. 308, 98 L.Ed.2d 267 (1987).

Accordingly, we reject all of Jackson's claims relating to his psychological evaluation and to Dr. Nelson's testimony.

3. Sufficiency of Evidence of Future Dangerousness

Since neither psychologist was willing to predict that Jackson would commit criminal acts of violence in the future, Jackson argues that the court erred in submitting this issue to the jury since it "could only arrive at a verdict by speculation and guesswork." We disagree.

Expert opinion is not required on this issue if there is sufficient evidence to permit a lay person to conclude that an accused would commit criminal acts of violence in the future that would constitute a serious danger to society. Indeed, we have held that a jury is entitled to disregard an expert's opinion that a defendant would not be dangerous in the future. *Saunders v. Commonwealth*, 242 Va. 107, 114-15, 406 S.E.2d 39, 43, *cert. denied*, 502 U.S. 944, 112 S.Ct. 386, 116 L.Ed.2d 337 (1991). Rejecting Jackson's contentions, we conclude that there was sufficient evidence to permit a reasonable person to conclude beyond a reasonable doubt that Jackson would be dangerous in the future.

4. Instructions refused

Jackson contends the court erroneously refused two instructions he tendered, one of which would have told the jury that it "must consider a mitigating circumstance if you find there is evidence to support it" and the other that the jury was not required to fix the punishment at death even if the jury found "beyond a reasonable doubt, the existence of the aggravating circumstance(s)." The claim is that these theories were not covered by other instructions.

We disagree. The only instruction granted in the penalty phase told the jury that if it found beyond a reasonable doubt that the Commonwealth proved future dangerousness, the jury may "fix the punishment of the defendant at death." It further instructed the jury that "if you believe from all of the evidence that the death penalty is not justified," then the jury could fix Jackson's punishment at life imprisonment or life imprisonment and a fine. Since both Jackson's theories were

covered by these instructions, he is not entitled to have duplicative instructions on those theories. *See, e.g., Tuggle v. Commonwealth*, 228 Va. 493, 508, 323 S.E.2d 539, 548 (1984), *vacated and remanded on other grounds*, 471 U.S. 1096, 105 S.Ct. 2315, 85 L.Ed.2d 835 (1985), *aff'd on remand*, 230 Va. 99, 334 S.E.2d 838 (1985), *cert. denied*, 478 U.S. 1010, 106 S.Ct. 3309, 92 L.Ed.2d 722 (1986). Furthermore, we have held that instructions similar to those given by the court in this case "adequately stated the statutory framework and were sufficient." *LeVasseur v. Commonwealth*, 225 Va. 564, 595, 304 S.E.2d 644, 661 (1983), *cert. denied*, 464 U.S. 1063, 104 S.Ct. 744, 79 L.Ed.2d 202 (1984). For these reasons, we find no error in the court's refusal of Jackson's tendered instructions.

VII. SENTENCE REVIEW

Under Code § 17-110.1(C)(1) and (2), we are required to determine "[w]hether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor," and "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

A. Passion and Prejudice

Jackson does not contend that the sentence of death was imposed under any of the impermissible factors and our independent review of the entire record fails to reveal that the jury's death sentence "was imposed under the influence of passion, prejudice or any other arbitrary factor." Code § 17-110.1(C)(1).

B. Excessiveness and Proportionality

Jackson argues that a review of similar capital murder cases "would reflect the excessiveness and disproportionate punishment inflicted on this 16 year old defendant." We disagree.

In our proportionality review, we have considered "whether other sentencing bodies in this jurisdiction generally impose the supreme penalty for comparable or similar crimes, considering both the crime and the defendant." *Jenkins v. Commonwealth*, 244 Va. 445, 461, 423 S.E.2d 360, 371 (1992), *cert. denied*, 507 U.S. 1036, 113 S.Ct. 1862, 123 L.Ed.2d 483 (1993). Our comparison of the record in this case with the records in other capital murder cases, including those in which life sentences were imposed, fails to indicate that the death penalty imposed in this case is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Code § 17-110.1(C)(2).

Since the jury based its death sentence solely on the "future dangerousness" predicate, we have given particular consideration to other capital murder cases in which robbery or attempted robbery was the underlying felony and the death penalty was based only on the "future dangerousness" predicate. Such cases were compiled in *Yeatts v. Commonwealth*, 242 Va. at 143, 410 S.E.2d at 267-68, and supplemented in *Chichester*, 248 Va. at 332- 33, 448 S.E.2d at 652, and *Roach v. Commonwealth*, 251 Va. at 351, 468 S.E.2d at 113 (17-year-old defendant).

Our conclusion is that, while there are exceptions, juries in this Commonwealth generally impose the death sentence for crimes comparable to Jackson's murder of Bonney. Jackson killed Bonney in cold blood simply because Bonney had refused to comply with Jackson's demand for money. This killing demonstrates Jackson's lack of respect for human life.

Although Jackson was only 16 years old when he killed Bonney, his criminal conduct on other occasions, especially the violent acts he committed while (1) on probation, (2) free on bond, and (3) in jail awaiting trial for these offenses, manifests an escalating pattern of violent criminal behavior that compels us to conclude that the imposition of the death

penalty in his case is neither excessive nor disproportionate to the penalty imposed in similar cases.[6]

VIII. CONCLUSION

We find no reversible error in the issues presented in this case. After reviewing Jackson's sentence of death pursuant to Code § 17-110.1, we decline to commute the sentence of death. Therefore, we will affirm the judgments of the trial court.

Affirmed.

HASSELL, J., concurring in part and dissenting in part.

HASSELL, Justice, concurring in part and dissenting in part.

Code § 17-110.1(C)(2) requires this Court to consider and determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

We have stated that "the test of proportionality is whether 'juries in this jurisdiction generally approve the supreme penalty for comparable or similar crimes.'" *Davidson v. Commonwealth*, 244 Va. 129, 136, 419 S.E.2d 656, 660, *cert. denied*, 506 U.S. 959, 113 S.Ct. 423, 121 L.Ed.2d 345 (1992) (citing *Smith v. Commonwealth*, 239 Va. 243, 271, 389 S.E.2d 871, 886, *cert. denied*, 498 U.S. 881, 111 S.Ct. 221, 112 L.Ed.2d 177 (1990) (quoting *Stamper v. Commonwealth*, 220 Va. 260, 284, 257 S.E.2d 808, 824 (1979), *cert. denied*, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980))). Juries in Virginia generally have not

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[6] Unlike the dissent, in resolving the issues of excessiveness and proportionality, we did not limit our comparison to the records in cases in which the defendants were 16 years old when the offenses were committed. Instead, we considered Jackson's age as one of many relevant factors.

approved of the imposition of the death penalty for 16-year-old capital murder offenders.

Since 1987, ten 16-year-old offenders have been convicted of capital murder, and only one defendant, Chauncey J. Jackson, has been sentenced to death. I agree with the majority that Jackson's offenses are atrocious and that he has exhibited little, if any, regard for the value of human life or the consequences of his criminal conduct. However, my review of all capital murder cases involving 16-year-old offenders in Virginia leads me to the conclusion that the sentence of death imposed upon Jackson is excessive and disproportionate to penalties imposed in similar cases.

For example, in *Novak v. Commonwealth*, 20 Va.App. 373, 382, 457 S.E.2d 402, 406 (1995), a Virginia Beach jury refused to impose the penalty of death upon a 16-year-old defendant, Shawn Paul Novak, even though the jury convicted him of capital murder. The facts in *Novak* are more egregious than the facts in the present case. Novak killed two young boys, age 7 and age 9. The seven-year-old victim died from "three stab wounds which would have been a quick three thrusts resulting in incapacitation and ... repeated cutting and slashing of the neck until it was almost decapitated...." The nine-year-old victim "had been killed by a 'blunt force injury' and 'multiple slashes' on his neck." *Id.* at 379-80, 457 S.E.2d at 405.

In *Owens v. Commonwealth*, No. 2259-95-1, 1996 WL 666739 (Va.App. Nov. 19, 1996), the defendant, Marvin T. Owens, was convicted of capital murder. Owens killed four persons, including a 14-year-old boy, by using a pistol to shoot each victim in the head. Just as Jackson, Owens had an extensive juvenile criminal history, including commitments to the Department of Youth and Family Services for the following criminal offenses: conspiracy to distribute cocaine, possession of cocaine with the intent to distribute, and possession of cocaine. The jury fixed Owens' punishment at life imprisonment.

The case of *Reid v. Commonwealth*, No. 1175-95-1, 1996 WL 363568 (Va.Ct.App. July 2, 1996), is very similar factually to the present case. There, the defendant, Dwayne M. Reid, then 16 years old, approached two males who were traveling in a truck in Suffolk. The men in the truck, Joseph Mehalko and Tommy Runyon, asked several young male pedestrians, including Reid, whether any of the pedestrians had "a twenty rock [of crack cocaine]." One of the pedestrians threw an item, about the size of a pebble, through a window into the truck, and Mehalko and Runyon, thinking the item was a rock of crack cocaine, began to search for it. As Runyon retrieved some money from his wallet, Mehalko noticed "a gun come through the passenger side window." A struggle ensued, and Reid shot Runyon in the head. Runyon subsequently died as a result of the gunshot wound.

Reid had a prior criminal record, and he had been convicted of the following crimes: two counts of armed robbery and two different offenses of use of a firearm during the commission of robbery. At a bench trial, Reid was convicted of capital murder and sentenced to life imprisonment.

In *Rea v. Commonwealth*, 14 Va.App. 940, 941, 421 S.E.2d 464, 465 (1992), the defendant, Stephen Rea, was convicted, at a jury trial, of three separate counts of capital murder. Rea killed three persons, including a 17-year-old boy, by shooting them with a firearm. Rea had an extensive juvenile criminal history. He was arrested for petty larceny which was taken under advisement for six months. He was arrested and charged for disorderly conduct, vandalism, and "being a runaway," and he was convicted and placed on supervised probation. He was arrested for trespass, which was resolved at the juvenile intake. He was arrested for violation of his probation. He was subsequently arrested for breaking and entering, petty larceny, and grand larceny, and placed on house arrest and ordered to pay restitution. He was also arrested for eluding police, reckless driving, and driving without a Virginia operator's license. The jury fixed Rea's punishment at life imprisonment for each of the capital

murder convictions. *See also Faulk v. Commonwealth*, CR 95J2 and CR95J4 (Southhampton County Cir. Ct. Sept. 17, 1996) (Defendant, 16 years of age at the time of the offenses, pled guilty to capital murder in the commission of robbery, capital murder in the commission of abduction, and robbery with a weapon, and sentenced to life imprisonment.); *Prostell v. Commonwealth*, No. J-1179 (Virginia Beach Cir. Ct. June 18, 1987) (The 16-year- old defendant, whose criminal history included one previous felony conviction as a juvenile, pled guilty to capital murder and received life imprisonment. The defendant killed the victim after being advised by a co-defendant that the defendant would receive $300 for the murder of the victim. At the time of the murder, the defendant was on probation after having been found guilty of robbery.); *Campbell v. Commonwealth*, No. 5559 (Amherst County Cir. Ct. June 4, 1987) (The defendant was found guilty at a bench trial of capital murder and certain other related crimes. The defendant, 16 years old at the date of this offense, entered a pizza restaurant wearing a ski mask and armed with a loaded 12-gauge shotgun, ordered the employees to the floor, and shot a restaurant employee in the head, killing him. The defendant was sentenced to life imprisonment.); *Stewart v. Commonwealth*, No. 2928-97-1 (Va.Ct.App. July 7, 1997) (This 16-year-old defendant pled guilty in the Norfolk Circuit Court to capital murder and certain other related offenses and was sentenced to life without parole plus 18 years. The defendant killed the victim with a pistol during an attempted robbery.). *Tross v. Commonwealth*, 21 Va.App. 362, 464 S.E.2d 523 (1995) (This 16-year-old defendant was convicted of capital murder, robbery, and using a firearm to commit murder and was sentenced to life imprisonment for the capital murder, 20 years' imprisonment for the robbery, and two years' imprisonment for the firearm charge. His prior record included convictions for petit larceny and possession of a beeper/pager on school grounds. He had been arrested and charged on two separate occasions for assault and battery, but those charges were *nolle prossed*.).

Shawn Novak, age 16, killed two young boys, but he was not sentenced to death. Stephen Rea, age 16, killed three people, including a teenager, but he was not sentenced to death. Marvin Owens, age 16, killed four persons, but he was not sentenced to death. Dwayne Reid, who committed crimes substantially similar to Jackson's crimes, was not sentenced to death. Upon comparison of Jackson's sentence of death, along with his criminal history and facts surrounding his case, to the facts and criminal histories of the other defendants who committed capital offenses at age 16, I can only conclude that Jackson's sentence of death is both excessive and disproportionate in violation of Code § 17-110.1(C)(2).

I would reduce Jackson's sentence of death to life imprisonment. In view of Jackson's sentences for his other convictions, he would remain incarcerated for the remainder of his natural life.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 5th *day of* June, 1998.

Chauncey Jacob Jackson, Appellant,

against Record Nos. 971720 and 971721
Circuit Court No. CR95003871

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgments rendered herein on the 17th day of April, 1998 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

/s/_____
Clerk

(2)

Supreme Court, U. S.
F I L E D
OCT 26 1998
CLERK

No. 98-583

In The

Supreme Court of the United States

October Term, 1998

CHAUNCEY JACKSON,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Has Jackson failed to preserve his claim that race was a factor in his death sentence when no such claim was presented to or decided by the Virginia Supreme Court?

2. Should certiorari be granted to review Jackson's defaulted, state-law proportionality challenge?

3. In a case where there is not the slightest hint of juror partiality or bias, is there any compelling reason for this Court to decide whether the Constitution absolutely forbids the seating of an "illiterate" juror?

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 1

REASONS FOR DENYING THE WRIT 3

I. JACKSON'S CLAIM THAT RACE WAS A FACTOR IN HIS DEATH SENTENCE HAS NOT BEEN PRESERVED FOR REVIEW 3

II. JACKSON'S PROPORTIONALITY CHALLENGE IS DEFAULTED AND RAISES NO COGNIZABLE FEDERAL ISSUE 5

III. JACKSON'S "ILLITERATE JUROR" CLAIM IS NOT WORTHY OF CERTIORARI 7

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Barclay v. Florida, 563 U.S. 939 (1983) 7

Chabrol v. Commonwealth, 245 Va. 327, 427 S.E.2d 374 (1993) 6

Illinois v. Gates, 462 U.S. 213 (1983) 4

In Re: Oliver, 333 U.S. 257 (1948) 9

In Re: Shibuya Jugiro, 140 U.S. 291 (1891) 8

Jackson v. Commonwealth, 255 Va. 625, 499 S.E.2d 538 (1998) ..... *passim*

Louisiana v. Winzer, 545 So.2d 1259 (La. App. 1989) 10

McCleskey v. Kemp, 481 U.S. 279 (1987) 5

McDonough Power Equipment v. Greenwood, 464 U.S. 548 (1984) 8, 9

Patton v. Yount, 467 U.S. 1025 (1984) 9, 10

People v. Dunn, 31 A.D. 139 (N.Y. 1898) 8

Pulley v. Harris, 465 U.S. 371 (1984) 7

United States v. Dempsey, 840 F.2d 1084 (10th Cir. 1987) 10

United States v. Humphreys, 982 F.2d 254 (8th Cir. 1992), *cert. denied*, 510 U.S. 812 (1993) 9

United States v. Uribe, 890 F.2d 554 (1st Cir. 1989) 8

Walton v. Arizona, 497 U.S. 639 (1990) 7

Yee v. Escondido, 503 U.S. 519 (1992) 4, 7

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND RULES

28 U.S.C. § 1865(b) 8
§ 8.01-2, Code of Virginia 8
§ 8.01-338, Code of Virginia 8
§ 17-110.1C, Code of Virginia 7
§ 17-110.1E, Code of Virginia 6
§ 19.2-264.3:1(G), Code of Virginia 3
§ 19.2-264.4, Code of Virginia 1
Rule 10(b) 7
Rule 10(c) 7
Rule 14.1(g)(i) 4
Rule 5:39, Rules of the Supreme Court of Virginia 6

STATEMENT OF THE CASE

On September 4, 1996, after a 10-day trial, a jury in the Circuit Court for the City of Norfolk convicted the petitioner, Chauncey Jacob Jackson, of capital murder, use of a firearm in commission of capital murder, a conspiracy to commit robbery, attempted robbery, use of a firearm while attempting robbery and of receiving stolen goods. The jury sentenced Jackson to death on the capital murder conviction finding that he represented a continuing serious threat to society. *See* Va. Code § 19.2-264.4.

After a separate sentencing hearing held May 20, 1997, the trial judge imposed sentence in accordance with the jury verdict. The judge additionally imposed sentences of ten years on the attempted robbery conviction, ten years on the conspiracy to commit robbery conviction, three years on the use of a firearm in commission of capital murder, and twenty years with all but two years suspended conditioned on twenty years of good behavior on the receiving stolen goods conviction.

The Supreme Court of Virginia affirmed Jackson's conviction and death sentence on April 17, 1998. *Jackson v. Commonwealth*, 255 Va. 625, 499 S.E.2d 538 (1998).

STATEMENT OF FACTS

The Virginia Supreme Court summarized the facts surrounding Jackson's offense as follows:

> The day after [Ronald] Bonney's murder, Jackson made a series of four oral statements to police investigators. The first statement was not

recorded, but the remaining three statements were recorded and transcribed. The following facts appear in one or more of those statements.

On the evening of August 31, 1994, Jackson was riding in a Jeep Cherokee driven by his friend, Rashad Vick. Vick stopped the vehicle when three other friends, standing near a so-called "dope house" on Vine Street, waved at them. One of the three friends suggested robbing a man, later identified as Ronald Gene Bonney, Jr., who was within sight, seated in the driver's seat of a Chevrolet Blazer parked nearby. Jackson and Vick agreed.

Accordingly, two of the group acted as "lookouts." Jackson procured a .25 caliber Beretta handgun from the Jeep. Accompanied by Calvin Outlaw and Angelo Artis, the other two members of the group, Jackson approached the parked vehicle. Outlaw placed his leg against the driver's door, next to Bonney, and later took the keys from the ignition switch when Bonney tried to drive away. Jackson, armed with the handgun, entered the front seat of the vehicle from the passenger's side, and, according to his last statement, Jackson told Bonney to "[g]ive it up." Bonney then "started patting his pockets and said, 'Give what up?'. . . . And then [Bonney] said, 'Shoot me, you little f – ker.' And then I cocked the gun, and then Angelo stepped up, and the gun jammed, and I tried to unjam it, and it shot." The gun fired three bullets which hit Bonney in the chest and arm and caused his death.

Jackson fled in the Jeep. He was arrested late that night and brought to police investigators for an interview at 7:20 a.m.

Jackson, 255 Va. at 632-633, 499 S.E.2d at 543.

REASONS FOR DENYING THE WRIT

I. JACKSON'S CLAIM THAT RACE WAS A FACTOR IN HIS DEATH SENTENCE HAS NOT BEEN PRESERVED FOR REVIEW.

Prior to the beginning of the penalty phase and out of the presence of the jury, Jackson moved to bar testimony on the issue of Jackson's future dangerousness by the Commonwealth's appointed mental health expert, Dr. Evan Nelson, unless and until Jackson offered evidence on the matter. The court and counsel then questioned Nelson as to whether he could deliver an opinion on Jackson's future dangerousness without relying on any statements made by Jackson. *See* Virginia Code § 19.2-264.3:1(G). During the course of this voir dire, Dr. Nelson first told the court and counsel that he could not deliver a definitive opinion on whether Jackson was "future dangerous." Nelson then acknowledged that he could base his testimony on matters other than Jackson's statements. Finally, Nelson also testified that historically there are several factors pertinent to an assessment of a person's propensity for future violent conduct, including "a defendant's race." The trial court ruled that Dr. Nelson could testify in the Commonwealth's penalty phase case-in-chief. Despite the trial court's ruling, the Commonwealth elected not to call Nelson. Jackson, however, called Dr. Nelson as his first mitigation witness. Dr. Nelson did not testify before the jury that "a defendant's race" was a factor in assessing a person's propensity for future dangerousness. Dr. Nelson also never opined that Jackson was a future danger because he was black. Nevertheless, Jackson asserts certiorari is warranted because

race supposedly "played a key role in the expert's opinion of future dangerousness." (Petition at 12).

A. Not raised below

Jackson never raised any race-based challenge to his death sentence in the Virginia Supreme Court and certainly did not attack Dr. Nelson's penalty phase testimony as violative of the Eighth Amendment and the Equal Protection Clause. Because the claim was not raised in the court below, certiorari is not warranted. *Yee v. Escondido*, 503 U.S. 519, 533 (1992); *Illinois v. Gates*, 462 U.S. 213, 218-220 (1983); Rule 14.1(g)(i).

B. Waiver

Jackson waived any claim of error based on Nelson's testimony by calling him as his own penalty-stage witness, ***after*** he had voir dired Dr. Nelson as to the basis for his testimony. This Court obviously should not grant certiorari to review an "error" which the petitioner invited.[1]

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[1] Jackson's assertion that Dr. Nelson was called by the defense only because the trial judge suggested such a procedure is categorically false. (Petition at 11, n.2). What the trial judge actually suggested was that, although Dr. Nelson was not prohibited from testifying in the Commonwealth's penalty phase case-in-chief, upon defense request, she would limit Nelson to a single appearance before the jury – in the Commonwealth's penalty phase rebuttal. Jackson elected not to follow that suggestion and called Dr. Nelson as his own witness.

C. No merit

Contrary to Jackson's overblown assertion, Dr. Nelson never "opined that Chauncey Jackson was a future risk to the community because he was black." (Petition at 16). Aside from the undisputed fact that Dr. Nelson did not opine that Jackson was future dangerous and specifically disavowed that such an opinion was even possible, all Dr. Nelson did was tell the trial judge, ***not*** the jury, that any defendant's race – whatever that race may be – was, along with a plethora of other considerations, historically pertinent in risk assessment. (Pet. App. 25a). In the context of race, this Court previously has declined "to assume that what is unexplained is invidious," *McCleskey v. Kemp*, 481 U.S. 279, 313 (1987), and that proposition is equally applicable here.

It cannot be ignored, moreover, that when Dr. Nelson testified before the jury, he simply ***never*** opined to the jury that Jackson would be "future dangerous." Nor did Dr. Nelson state before the jury that "a defendant's race" was historically important in assessing risk. Rather, the bulk of Dr. Nelson's trial testimony was consumed by his diagnosis that Jackson suffered from an anti-social personality disorder. There simply is no showing that Jackson's death sentence was in any way based upon his race.

II. JACKSON'S PROPORTIONALITY CHALLENGE IS DEFAULTED AND RAISES NO COGNIZABLE FEDERAL ISSUE.

Jackson asserts that the proportionality review conducted by the Virginia Supreme Court on direct appeal deprived him of due process of law. Certiorari, however,

is not warranted because Jackson's proportionality claim was not raised in the state court, and because the claim does not raise a cognizable federal constitutional issue.

A. Default

In Virginia, the test for proportionality is "whether generally juries in [Virginia] impose the death sentence for comparable or similar crimes, considering both the crime and the defendant." *Chabrol v. Commonwealth*, 245 Va. 327, 335, 427 S.E.2d 374, 378 (1993). Jackson asserts that the proportionality review conducted by the Virginia Supreme Court is unconstitutional because it gives him no meaningful notice of exactly what the state court considers a "similar" case and no opportunity to be heard.

This constitutional challenge, however, is defaulted. Jackson could have challenged the constitutionality of Virginia Code § 17-110.1E during his direct appeal.[2] And, certainly, Jackson could have sought rehearing after the opinion of the Virginia Supreme Court came down and, at that time, argued that the cases relied upon by the state court in its proportionality analysis were dissimilar. *See* Virginia Supreme Court Rule 5:39 (allowing rehearing petition to alert court to errors of fact and law in its opinion). Jackson, however, did none of this. His claim,

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[2] Section 17-110.1E states that the Virginia Supreme Court "may accumulate the records of all capital felony cases tried within such period as the court may determine" and directs the court to "consider such records . . . as a guide in determining whether the [death] sentence . . . under review is excessive."

therefore, is not properly before this Court. *See Yee*, 503 U.S. at 533.

B. No federal issue

Proportionality review is not required under the United States Constitution. *Pulley v. Harris*, 465 U.S. 371 (1984). Jackson, therefore, has failed to state a federal claim and certiorari is improper. *See* U.S.Sup.Ct. Rules 10(b) and 10(c).

In accordance with Virginia law, moreover, the Virginia Supreme Court considered all the records of all capital murder cases previously reviewed by the Court and determined that Jackson's sentence was (1) not "imposed under the influence of passion, prejudice, or any other arbitrary factor," and (2) was not "excessive or disproportionate to sentences generally imposed by other sentencing bodies in Virginia for comparable or similar crimes." *Jackson*, 255 Va. at 650-652, 499 S.E.2d at 554-555. *See* Va. Code § 17-110.1C. The Virginia Supreme Court certainly was not required by the Constitution to do any more than this, and this Court should not grant certiorari to re-examine the Virginia Supreme Court's good-faith findings. *See Walton v. Arizona*, 497 U.S. 639, 656 (1990); *see also Barclay v. Florida*, 563 U.S. 939, 957 (1983) ("mere errors of state law are not the concern of this Court.").

III. JACKSON'S "ILLITERATE JUROR" CLAIM IS NOT WORTHY OF CERTIORARI.

Finally, Jackson asserts that there was federal constitutional error in his case because Mary Highter, who was

"somewhat illiterate," sat on his jury. Jackson recognizes that qualifications of jurors traditionally has been a matter committed to the sound discretion of the Legislature. (Petition at 27-28). He nonetheless asserts that this Court should grant certiorari and declare that the Constitution absolutely forbids the seating of illiterate persons on a jury in a state capital murder trial.

Petitioner presents no "compelling reason" to grant certiorari. "It rests with each state to prescribe qualifications as its deems proper for jurymen, taking care only that no discrimination . . . be made against any class of citizens solely because of their race." *In Re: Shibuya Jugiro*, 140 U.S. 291 (1891); *see also People v. Dunn*, 31 A.D. 139, 141 (N.Y. 1898) ("How [an impartial jury] shall be attained is left to the legislative judgment, subject only to certain fundamental principles. There is no express constitutional requirement as to the qualifications of the trial jury."); *United States v. Uribe*, 890 F.2d 554, 561 (1st Cir. 1989) (recognizing that 28 U.S.C. § 1865, which prohibits certain categories of persons from acting as jurors "does not implement a constitutional bar to jury service").

In Virginia, the General Assembly has determined that illiteracy does not automatically disqualify a person from serving as a juror. *See* Va. Code § 8.01-338 and § 8.01-2 (disqualifying from jury service those, among others, convicted of a felony, adjudicated mentally incompetent, those who are drug addicted or of "advanced age or impaired health"); *see also Jackson*, 255 Va. at 641, 499 S.E.2d at 548. Even in federal court, the statutory literacy requirement for jurors, *see* 28 U.S.C. § 1865(b), requires only "a minimum competency in the English language," *McDonough Power Equipment v. Greenwood*, 464 U.S. 548,

554 (1984), and there is no dispute that Highter was, at least, minimally competent in the English language.

In addition, Jackson's proposed rule – the per se exclusion of illiterate persons from jury service – "would be appropriate only if one could reasonably conclude that [illiterate persons] are always biased against one party or another." *United States v. Humphreys*, 982 F.2d 254, 264 (8th Cir. 1992) (rejecting the argument that the Sixth Amendment right to an impartial jury requires an absolute bar to felon-jurors), *cert. denied*, 510 U.S. 812 (1993). The touchstone of the Sixth Amendment right to an impartial jury, after all, is protection against juror bias. *See McDonough*, 464 U.S. at 554; *see also In Re: Oliver*, 333 U.S. 257 (1948) (the right to trial by jury guarantees accused a fair trial by a panel of impartial jurors). It is, in fact, ***unreasonable*** to conclude that illiterate persons are always biased against one party or another, especially in Jackson's case. Jackson never has even alleged, let alone established, that Highter was biased or partial. Rather, his whole claim rests on the faulty assumption that a juror who admittedly cannot read or write past a sixth grade level also cannot "comprehend and intelligently resolve the factual issues" inherent in a capital murder case and may have "depended on the prejudices and biases of other jurors" in arriving at a verdict.[3] (Petition at 28). To be clear, Jackson ***never*** has established that

---

[3] Jackson voiced no objection to the impartiality of these "other jurors" after individual and unrestricted voir dire that last three full days. *See Patton v. Yount*, 467 U.S. 1025, 1038 (1984) ("It is fair to assume that [voir dire] usually identifies bias.").

Highter could not and did not adequately understand and independently weigh the evidence before her.

Highter's ability to perceive and weigh the evidence, moreover, was "best evaluated by the trial judge." *United States v. Dempsey*, 830 F.3d 1084, 1088 (10th Cir. 1987) (rejecting constitutional challenge to the seating of a deaf juror); *see also Patton*, 467 U.S. at 1039 (the trial judge is "best situated to determine competency to serve impartially"). Here, the trial judge questioned Highter and learned that she had a sixth grade education and had recently served on another jury without incident.

The trial judge, moreover, took steps to insure that Highter's apparent lack of education did not prejudice Jackson. All written evidence was read aloud to the jury. *See Louisiana v. Winzer*, 545 So.2d 1259, 1264 (La. App. 1989) ("where written evidence is read aloud into the record there is no prejudice shown to the defendant when a juror is illiterate."). Finally, the trial court insured that all instructions, including the verdict form, were slowly and methodically read to the jury. *Jackson*, 255 Va. at 641, 499 S.E.2d at 548. Certiorari should not be granted to review the trial judge's fact-specific determination that Highter, in accordance with Virginia law, was fit for jury service.

CONCLUSION

Jackson clearly has not presented any "special and important" reasons which should warrant certiorari review of his claims. Accordingly, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA,
Respondent herein.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CHAUNCEY JACKSON,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for Writ of Certiorari to
the Supreme Court of Virginia

PETITIONER'S REPLY MEMORANDUM

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8 pp

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES.....	ii
I. APPELLATE REVIEW OF PASSION AND PREJUDICE CANNOT BE WAIVED.....	1
II. THE RIGHT TO ARGUE PROPORTIONALITY REQUIRES AN ESTABLISHED BENCHMARK.....	3
III. A JUROR'S INABILITY TO READ THE EVIDENCE IS CONSTITUTIONALLY DISQUALIFYING.....	4
CONCLUSION.....	5

TABLE OF AUTHORITIES

	Page
CASES	
Chabrol v. Commonwealth, 245 Va. 327, 427 S.E.2d 374 (1993).....	1
Davidson v. Commonwealth, 244 Va. 129, 419 S.E.2d 656 (1992).....	1
Parker v. Dugger, 498 U.S. 308 (1991).....	1
Stamper v. Commonwealth, 220 Va. 260, 257 S.E.2d 808, 824 (1979).....	4
Turner v. Williams, 35 F.3d 872 (4th Cir. 1994), *cert. denied sub nom, Turner v. Jabe*, 514 U.S. 1016 (1995), *overruled in part on other grounds by O'Dell v. Netherland*, 95 F.3d 214 (4th Cir. 1996).....	3
STATUTES	
Va. Code Ann. § 17-110.1 (C) (2) (Michie 1996).....	1

I. APPELLATE REVIEW OF PASSION AND PREJUDICE CANNOT BE WAIVED

On the ground that no race-based objection was made at trial by Petitioner, the Commonwealth contends that the Petitioner's entitlement to a racially blind trial was "not preserved." For the first time in this case, the Commonwealth is arguing that the requirement of Virginia Supreme Court review of the death sentence has been waived because Petitioner did not affirmatively claim to have been condemned as a result of racial prejudice and passion. The Commonwealth's argument overlooks that the appellate review is unconditionally mandatory. The Virginia Supreme Court reviews the death sentence for passion, prejudice and proportionality under *Va. Code Ann.* § 17-110.1(c)(2) even in the absence of an appeal. *See, e.g., Chabrol v. Commonwealth*, 245 Va. 327, 427 S.E.2d 374 (1993); *Davidson v. Commonwealth*, 244 Va. 129, 419 S.E.2d 656 (1992).

The Commonwealth next asserts that Petitioner waived his right to a proportionality and prejudice review by the appellate court because he failed to raise the subject in a request for reconsideration by that court after it issued its opinion. Petitioner did file a motion for reconsideration by the Virginia Supreme Court, three pages of which were devoted to claims of the court's error on the very subject of prejudice and proportionality.[1]

---

[1]At one point, the motion said "...individualized determinations as to the appropriateness of the death penalty as to each defendant is 'crucial' under any death sentencing scheme to ensure that the death penalty is not imposed arbitrarily or irrationally.'" *Citing Parker v. Dugger*, 498 U.S. 308, 321 (1991).

(footnote continued to next page)

Finally, the Commonwealth labels as an "overblown assertion" Petitioner's objection to the use of his race as an indicator of his future dangerousness. (Opposition at 5). Yet, in its brief, the Commonwealth specifically acknowledges the role of race in Petitioner's death sentence:

> During the course of this voir dire, Dr. Nelson [the prosecution psychologist] first told the court and counsel that he could not deliver a definitive opinion on whether Jackson was "future dangerous."

(Opposition at 3).

> Nelson then acknowledged that he could base his testimony on matters other than Jackson's statements [during a pretrial interview].

Also, the Commonwealth accuses Petitioner of a "categorically false" representation in saying that the trial court restricted the Commonwealth's psychologist to testifying once and that his testimony would occur after the defense rested in the sentencing phase. Thus, he would have been among the last witnesses and permitted then, for the first time, to offer testimony on future dangerousness. In approximately sixty pages of transcript on this subject, the trial judge said:

> ...it would be within the Court's discretion to keep him (Dr. Nelson) from testifying twice...and at the defendant's option, his expert testimony if it is to be offered in the rebuttal as to mitigation.
>
> To be offered as well on future dangerousness *at the same time* so that the jury does not hear twice all of his credentials....
>
> (Emphasis added).

(*Id*).

> Finally, Nelson also testified that historically there are several factors pertinent to an assessment of a person's propensity for future violent conduct, including "a defendant's race.'

(*Id*).

Therefore, the Commonwealth recognizes that the psychologist testified he could not opine on future dangerousness, would not rely upon Petitioner's interview statements to him and would instead rely upon the defendant's race as a basis for his testimony.

Given that the Virginia Supreme Court has found that passion and prejudice were absent from the process of sentencing Petitioner to death, the unanswered question posed to this Court remains whether the psychologist's reliance on race as one basis for determining Petitioner's risk of future violent acts can be said not to have so systemically infected the sentencing proceedings and its participants as not to violate Petitioner's due process, equal protection and Eighth Amendment rights.

II. THE RIGHT TO ARGUE PROPORTIONALITY REQUIRES AN ESTABLISHED BENCHMARK

Petitioner's claim, important and unopposed, is that, while he was permitted by the Virginia death penalty statute to brief and argue prejudice, passion and proportionality to the Supreme Court of Virginia, he was uninformed of what the standard is for measuring proportionality. Petitioner's challenge is directed to the application of the statute in this case, an error which "could not have been raised on direct

appeal because appellate review had yet to take place." *Turner v. Williams*, 35 F.3d 872, 891, n.8 (4th Cir. 1994), *cert. denied sub nom, Turner v. Jabe*, 514 U.S. 1016 (1995), *overruled in part on other grounds by O'Dell v. Netherland*, 95 F.3d 214 (4th Cir. 1996). The challenge is not directed to the facial constitutionality of the Virginia death penalty review statute. The Commonwealth's opposition to the Petition, directed to such a non-existent claim, merely introduces a distraction.

Petitioner claims that he was denied due process as a result of the application of the Virginia death penalty review statute. The only basis for proportionality comparison announced by the Virginia Supreme Court is that the death penalty will be upheld if it is imposed in a case in which "juries in this jurisdiction impose the death sentence for conduct similar to that of the defendant." *Stamper v. Commonwealth*, 220 Va. 260, 283-284, 257 S.E.2d 808, 824 (1979). That "standard" is so vague that it is meaningless. As a consequence, Petitioner was denied the process which he was due in order to brief and argue meaningfully the issues to be considered by the court.

III. A JUROR'S INABILITY TO READ THE EVIDENCE IS CONSTITIONALLY DISQUALIFYING

The Commonwealth contends that the Petitioner seeks to have this Court bar illiterate jurors from jury service. (Opposition at 9). That incorrect assertion obscures the important question presented. The question is whether seating a juror who cannot read the English language deprives a capital defendant, in a case with material documentary evidence, of the Constitutional right to an impartial—meaning, in part, an independent—jury in derogation of the Sixth and Fourteenth Amendments.

CONCLUSION

It is prayed that the Petition for Certiorari be granted.

Respectfully submitted,

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